United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

461

No. 17,561

LEO G. SHERIDAN,

Appellant,

v.

PERPETUAL BUILDING ASSOCIATION,
JUNIOR F. CROWELL, individually and as trustee,
SAMUEL SCRIVENER, JR., individually and as trustee,

Appellees.

SECOND
APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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QUESTIONS PRESENTED

Plaintiff borrower suffered a loss in consequence of certain foreclosure proceedings and other actions under a deed of trust where both trustees were intimately associated with the lender, Perpetual Building Association. On a previous appeal this Court reversed a trial finding for defendants, but remanded to give Perpetual and the trustees a second opportunity to discharge the burden of proof laid on them because of the conflict of interest shown.

The **first question** here is whether defendants' evidence and the findings at the second trial withstand careful scrutiny in the following respects:

1. Disclosure of conflicting interests

2. Diligence and prudence

3. Improper delegation and failure to keep beneficiary informed

4. Partiality to interests of one beneficiary and indifference to the rights of the other.

The **second question** is whether defendants had any right to seize a joint account with plaintiff before a deficiency had been determined by a completed foreclosure sale. Assuming they had such right, were they estopped from asserting it by having previously excluded plaintiff from their foreclosure considerations on the basis that they would not enforce a deficiency?

The **third question** is whether defendants by reason of their conflict of interest are unconditionally barred from charging their loss to plaintiff.

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Appellant,

v.

PERPETUAL BUILDING ASSOCIATION,
JUNIOR F. CROWELL, individually and as trustee,
SAMUEL SCRIVENER, JR., individually and as trustee,

Appellees.

Second Appeal from the United States District Court
For the District of Columbia

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal to review a final judgment entered November 16, 1962 by the United States District Court for the District of Columbia which had general jurisdiction under § 11-306, D. C. Code, 1961 Edition (JA 4). An appeal was duly noted December 14, 1962 (JA 154). The United

States Court of Appeals for the District of Columbia Circuit has jurisdiction to review such judgment under 28 U.S.C. 1291.

STATEMENT OF THE CASE

Plaintiff-appellant, Leo G. Sheridan, sued defendant-appellees, Perpetual Building Association and Messrs. Crowell and Scrivener, to recover monies deposited with the Association in the name of "Leo G. Sheridan and Perpetual Building Association, as interests may appear." In June of 1958 Perpetual seized the balance in this account to reduce an installment loan it had made to Sheridan in 1952. Its claim to these monies was based upon the deed of trust securing the loan and depended on the actions of the trustees thereunder, Crowell and Scrivener, both of whom were closely connected with Perpetual. Specifically drawn into question were the actions of all defendants in reference to certain foreclosure proceedings had in 1958, years after Sheridan had sold the property securing the loan.

The first trial in District Court was upon stipulated facts and documents produced by defendants. It resulted in a dismissal of the complaint, except as to a part of the monies which defendants admitted at trial was due plaintiff. This court, sitting en banc, reversed the dismissal and remanded for further proceedings which would give effect to certain principles flowing from the fact of the trustees' close connection with Perpetual. **Sheridan** v. **Perpetual**, 112 U.S. App. D.C. 82, 299 F.2d 463, No. 16,167, decided February 1, 1962.

The joint appendix filed in the previous appeal (JA 1-53) is being treated as part of the joint appendix in this case (which begins JA 55 et seq.) pursuant to order of this court entered March 7, 1963.

At the second trial the documents and stipulations from the first (JA 43-53) were duly entered and counsel agreed that former Findings 1 through 12 were correct as far as they went (JA 35-39, 135-136). Then, pursuant to this court's ruling that a fiduciary with conflicting

interests must "bear the burden of proving that he has been faithful to his trust,"[1] defendants undertook to present additional evidence so that the court might "scrutinize very closely all that . . . [they] did in the execution of the trust . . ."[2]

Defendants called three witnesses besides Perpetual's treasurer and defendant-trustees. During the course of testimony more documents were introduced into evidence. However, the vast bulk of this material was routine undisputed fact, adequately summed up for the most part in the court's findings.[3] However, there was much evidence at trial upon subjects with respect to which the court refused to make any finding of fact, although requested to do so by plaintiff.[4]

The chronological statement which follows will therefore discuss trial evidence only as to controversial findings or subjects upon which a finding of fact was refused. In all other instances, the findings or documents themselves will suffice for references.

In the Beginning

In 1952 Sheridan borrowed $13,500 from Perpetual. He gave a promissory note, repayable in monthly installments, secured by a deed of trust on realty then owned by him at 1743 Eighteenth Street, N.W. (J.A. 136).

Defendants Scrivener and Crowell were named trustees in the deed of trust. Mr. Scrivener is an officer and director of Perpetual. Mr.

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1 **Sheridan** v. **Perpetual**, 112 U.S. App. D.C. 82, 84, 299 F.2d 463.

2 **Ibid.**, 83, 84.

3 Findings 1 and 2, 4 through 10, 13, 14 and 16 (JA 135-140, 141-142). As Finding 1 points out old Findings 1 through 12 (JA 35-41) are stipulated. They may be found in new Findings 2 through 11, which correspond with old Findings 1 through 10, and in new Findings 13 and 14, which correspond with old Findings 11 and 12. Nothing has been added to most of these old findings and the additions found in new Findings 5, 9, 10, 14 and 16 were essentially unquestioned. Findings 3, 11, 12 and 15, although containing some controversial material, are mostly undisputed.

4 Requests for additional material to be added to new Findings 3, 5, 7, 9, 11, 12, 13, and 14 were denied, the requests being numbered in the order of the old findings as Nos. 2, 4, 6, 8, 10, 11, 12, and 13 (JA 146-150).

Crowell manages Fidelity Investment Company, a partnership composed of all the Directors of Perpetual (JA 136).

No evidence was offered indicating that the trustees or Perpetual ever advised plaintiff of the connection between them (JA 128). The only testimony touching this subject was that of Mr. Crowell who said he had seen newspaper advertisements of Perpetual which included Mr. Scrivener's name as one of the directors. The "little circulars" kept on the counters also included the name of "Mr. Samuel Scrivener" (JA 120). However, the fact that all the directors of Perpetual are partners in The Fidelity Investment Company has never been communicated "to the public, in the newspapers, on the court record, or any other place," except "perhaps on one occasion when I was under oath as a witness (JA 120-121).[5] Fidelity Investment Company dealings with Perpetual include acting as insurance agent for property insurance required under Perpetual's deeds of trust wherever the borrower fails to designate another agent. Fidelity earns commissions on this business which inures to its partners, the directors of Perpetual, but not to Perpetual (JA 78-81, 83, 91-92, 121).

Plaintiff requested the court to make findings on the failure of the trustees to demonstrate full disclosure of their conflicting interests (JA 127-129, 146, 147). The court refused, finding only that plaintiff had not been "formally" advised (JA 136). Because plaintiff had not testified,[6] the court did not know whether he actually knew of the connection, there "being evidence" that Scrivener's position on the board of directors was regularly published and "well known in the business community" (JA 128-129, 136). No comment was made about the extent of the business community's knowledge that all the directors of Perpetual were dealing with Perpetual as partners in Fidelity Investment Company (JA 128).

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[5] The records in this court in former cases involving these parties show only that "Perpetual is a client or customer" of Fidelity. Perpetual's brief in **Alpar** v. **Perpetual,** 104 U.S.App.D.C.341, 262 F.2d 230, No. 14,189, p. 6 and appendix references.

[6] His advanced years and ill health prevented him from being present in the courtroom. Nevertheless, he was being held under subpoena by defendants subject to their half-hour call to appear as a witness (JA 144-145, 150; see also JA 153).

Insurance

The deed of trust on Sheridan's property provided among other things,

> "(5) that the improvements forming part of said realty shall be insured to the satisfaction of the Treasurer [of Perpetual], who shall have the right to designate the insurer and to apply the proceeds of such insurance, including any premium rebate, to any deficiency in repayment to the Treasurer of any loan, additional amount or advance secured by this deed of trust. . ."

(JA 45, 136). Pursuant to this Sheridan was provided with a policy of fire insurance written through Fidelity Investment Company in Firemens Insurance Company, a company of which the president of Perpetual is also an officer, director, and owner of a substantial but undisclosed amount of stock. The policy named Sheridan as the assured. It also contained provisions dealing with the interests of Perpetual, but the terms thereof were not disclosed at trial (JA 40-41, 66). Plaintiff requested a finding to this effect (JA 129, 147) but the court refused to note anything beyond the fact that the policy of insurance was written through Fidelity Investment Company (JA 129, 138).

. . . and payment of fire loss

In February of 1955, the improvements on Sheridan's property were partially destroyed by fire. The fire damage, amounting to $9,713.41, was paid by a check of Firemens Insurance Company made out jointly to plaintiff and Perpetual but delivered to Perpetual. It was held by Perpetual for two years before being deposited in April 1957 to an account in the name of "Leo G. Sheridan and Perpetual Building Association, as their interests may appear" (JA 137-138). The court was puzzled by the absence of any evidence of agreement between Sheridan and Perpetual about terms for holding this deposit, and speculated about the provisions of the antecedent fire insurance policy under which the money was originally paid to them (JA 122-126). However, a finding in this regard was refused (JA 129, 147, 137-138).

Property sold

In the meantime, however, shortly after the fire, Sheridan sold his property in its unrepaired condition to one Hollander for $12,950. So that there could be no possible misunderstanding with the purchaser, the contract of sale specifically provided that the purchaser would have no interest in the proceeds of the fire insurance represented by the check then being held by Perpetual (JA 138).

. . . and indebtedness assumed

In part payment of the sales price, the purchaser agreed to assume payment of the balance of Sheridan's indebtedness to Perpetual. Accordingly, in November 1955 Sheridan deeded the property to Hollander's wife, one Shirley L. Schnitzer, and in December 1955 Perpetual received notice from the title company that she was the new owner and had assumed payment of Perpetual's loan on the property (JA138). The court refused to find that "due note was made of this by Perpetual on all its records, including, among other things, the substitution of Schnitzer's mailing address in place of Sheridan's" (JA 47, 48, 130, 134-135, 138). In June of 1956, Schnitzer transferred the property to The 1823-1825 Jefferson Place Northwest Company, a corporation of which her husband was president (JA138). However, no assumption was involved in the transfer of Schnitzer to the corporation, and Perpetual's records were not changed as before. The court refused a finding on this point (JA 130, 138, 147).

After payments were assumed by Schnitzer in December of 1955, there was seldom a time when the loan was current (JA 47). Nevertheless, in apparent recognition of the substantial repair of fire damage since 1955, in June of 1957 Perpetual began to permit Sheridan to make withdrawals from the joint account it had established with him out of the insurance proceeds from the fire loss he had suffered in 1955. Perpetual continued to authorize withdrawals by Sheridan between June of 1957 and March of 1958, the total amounting to over $4,000 (JA 138).

Defaults and deterioration

Throughout the time these withdrawals were being made by Sheridan, the note payments Schnitzer had agreed to make continued seriously in arrears. Nothing was ever paid after August 1957. (Compare JA 47 with JA 138). Her transferee, The 1823-1825 Jefferson Place Northwest Company, had placed three additional trusts against the property and suffered numerous judgments and liens against it, including a federal tax lien in excess of $4,000 which attached July 31, 1957. Total liens subsequent to Perpetual's first trust, all for debts of The Jefferson Place Northwest Company, amounted to more than $25,000, which,added to the balance of more than $11,500 due Perpetual, made the total of the liens on the property in the neighborhood of $37,000 (JA 139-140).

The court was asked to find that the renovation of this property had been at a standstill since prior to April of 1957 (JA135), and that this fact had been reported to Perpetual by its own appraisers in April and again in July of 1957 when they recommended foreclosure "to prevent further vandalism" (JA134). Hollander was in jail (JA 98). The court mentioned the state of disrepair and the vandalism, but failed to note the long duration of this situation and the persistent reports of it in Perpetual's files (JA 130-131, 139, 148; cf. JA 68-69, 85, 89, 102, 104-106, 115).

The first notice of foreclosure was given in April of 1957 (JA 63). Such notices bearing the name of the auctioneering firm of Thomas J. Owen and Son are not actually sent out by them, but are handled entirely by Perpetual. The head of the firm of auctioneers is the chairman of the board of Perpetual (JA 62, 65, 82, , ,). These notices also bear the names of the trustees, but the matter appears not to have been drawn to their attention until December of 1957 at or after a meeting of the executive committee of Perpetual (JA 63). Several other notices of foreclosure had been mailed out in the meantime but had been withdrawn or postponed by Perpetual's treasurer or president, or both. The last such postponement in December of 1957 was at the request of the attorney for a second trust holder (JA 70-74). Plaintiff, along with junior lienors

known to Perpetual, received copies of these formal notices. Otherwise he was not consulted nor advised by Perpetual or the trustees with respect to any of the foregoing matters (JA 77-78, 100-102, 119, 131-133). The court was asked to make a finding accordingly, but refused to do so (JA 131-132, 139, 148).

Foreclosure #1

Finally, January 3, 1958, after due notice and advertisement, the trustees sold the property at foreclosure for $12,050. The purchaser assumed the further responsibility, required by the terms of sale, of satisfying the $4,000 U. S. tax lien against the property. The purchasers, Lt. Colonel Kenneth S. DuMond and his wife, were the owners of two of the junior trusts on the property given by the defaulting Jefferson Place Company. The face amount of their two notes was $11,000 (JA 139-140). He was the only bidder at the sale besides Perpetual, whose customary initial bid, $12,000 in this case, covered the amount of the unpaid balance of the loan ($11,706.15) as well as the costs and expenses of the sale (JA 38-39, 47, 49, 50, 67).

The terms of sale called for settlement in thirty days. Perpetual granted DuMond an extension of an additional thirty days after the sale to assist him in his efforts to procure a release of the U. S. tax lien (JA 140).

February 18, 1958 DuMond's attorney wrote the treasurer of Perpetual that his clients' application for a discharge of the tax lien had been denied. While not disputing the announced terms of the sale which placed the obligation on his clients to satisfy the tax lien, he thought there was no legal obligation to comply with these terms because unnamed people at the sale had been optimistic that an application for release of the lien would be readily granted. He therefore requested that the deposit of $500 be returned (JA 49, 50, 140-141).

The court summed up the courses open to the trustees as follows:

> "(1) to sell the property at the risk and cost of the defaulting purchaser, holding the deposit to cover any deficiency in the second sale over the first; (2) to sue the defaulting purchaser for specific performance; (3) to forfeit the deposit as liquidated damages and apply the forfeited deposit to the cost of the first sale and any balance to the note."

He then found that the trustees "together with Mr. Thomas of Perpetual, discussed the question of what action should be pursued against the defaulting bidder DuMond." (JA 140-141). The time, place, circumstances, parties present and subjects discussed were points of great confusion in the testimony of the two trustees (JA 74-75, 83-84, 94-95, 98-99, 117-119) and Mr. Thomas merely "assumed" such a meeting (JA 74-75). Nevertheless, the court concluded that these parties rejected the first and second courses of action because of "possible difficulties" in obtaining service on the defaulting purchaser who was an Army officer stationed at "some secret installation" in Pennsylvania, and this would entail "the outlay of substantial court costs and attorney's fees." They then decided to adopt the third course of action, there being "no reason to believe that the property would bring less at a second sale than at the first", and if the tax lien were released "it would bring more" (JA 140-141). But it seems the most the trustees looked forward to was realizing the "same price at another sale" (JA 86-87). Nor was any greater or lesser optimism in this regard discounted by the recognized poor experience at the first sale (JA 68-69), the long-continued deterioration of this vacant property (JA 68-69, 85, 89, 102, 104-106, 115, 134-135), and the poor success had on three prior attempts at securing a release of the tax lien (JA 87, 141). If the first alternative of a resale at the risk and cost of the defaulting purchaser was considered at all, it was not considered long enough for Mr. Scrivener to learn "how you go about that" (JA 86), although the procedure is detailed in the announced terms of sale (JA 49, 139). The right to apply the retained deposit against any resulting loss without releasing the purchaser from liability for a greater loss was noted by Mr. Scrivener in his brief in this court on the previous appeal (No. 16,167, Appellee's brief, p. 11, citing **Sheffield** v. **Paul T. Stone,** 68 App. D.C. 378, 98 F.2d 250).

In Perpetual's February 26 reply to DuMond's attorney, Mr. Thomas failed to mention consultation with anyone but "Mr. Samuel Scrivener, Jr., **legal counsel** to this Association" (JA 51, emphasis added). He stated that if settlement were not made the "deposit will be forfeited and the property readvertised and resold." March 5, 1958 DuMond's attorney advised Mr. Thomas by letter that his client considered the deposit forfeited in accordance with the terms of Mr. Thomas' letter of February 26, 1958 (JA 52).

Thereafter defendants' attempts to obtain a release of the tax lien met with the same lack of success as before (JA 141).

Plaintiff was present at the sale of January 3, 1958, but he was neither consulted nor advised by Perpetual or the trustees with respect to any of the foregoing matters before or after the sale (JA 60, 77-78, 100-102, 119). A finding to this effect was refused (JA 131-132, 141, 148-149).

Sheridan's money seized and second foreclosure authorized

June 19, 1958 Perpetual seized the balance in the joint account it had with Sheridan amounting to $4,427.26 and applied it to reduce the balance of the first trust loan to $7,909.04. The right to do so was premised on the fact that the 1955 fire damage had not been completely repaired [7] and payments on the loan were in arrears (JA 141-142). The court refused to make findings with respect to the following matters (JA 141, 149):

Mr. Thomas testified that authority to seize Sheridan's account was given following a meeting of Perpetual's executive committee that same

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[7] The deed of trust provided, "(4) that all buildings, improvements and fixtures forming part of said realty shall be kept in substantially the same condition as that which they had at the date of this Deed of Trust . . . and the Treasurer may require said grantor to make any repairs, improvements or changes necessary to maintain said realty in the aforesaid described condition . . ." (JA 45). However, the remedies for "default" provided in the deed of trust are very specific, being limited for the most part to foreclosure. Specifically they do not include the right to "apply the proceeds of . . . insurance" which is a remedy only in the event of a "deficiency in repayment," which can only be ascertained after a completed sale of the property. (JA 44-45, 78).

day, June 19, 1958. After this same meeting directions were also given for the second foreclosure sale and that such sale should be made free of any obligation on the part of the purchaser to satisfy the tax lien (JA 75-77). Mr. Baltz the "head" of Perpetual "in fact as well as name" was involved in these determinations. "What Mr. Baltz says is usually done." To the murmured qualification of Mr. Scrivener "unless we veto him," the court wondered, "Did you ever do it?" (JA 87).

No notice of the willingness of Perpetual to assume the risk of an unsatisfied tax lien was given to DuMond or his attorney, although formal notice of the sale was sent to them (JA 60-61, 64-65). Plaintiff was neither consulted nor advised by Perpetual or the trustees as to any of the foregoing matters, not even the seizure of his account. Only formal notice of the second sale was mailed to him (JA 77-78, 100-102, 119).

Foreclosure #2

The second sale brought $9,550 free of any obligation on the part of the purchaser to satisfy the tax lien (JA 142). As was the case at the first foreclosure sale, and the usual practice at all foreclosures by Perpetual, the treasurer made an initial bid sufficient in amount to cover the balance due on Perpetual's loan and the costs and expenses of the sale. Also, as in the first sale, there was a general reluctance to bid. The purchaser was the only other bidder paying just $50 over Perpetual's initial bid. Sheridan did not attend this sale, nor did Perpetual or the trustees consult or advise with him respecting it beyond the mailing of a formal notice (JA 67-69, 77-78, 100-102, 119). The court refused to make any findings with respect to this. Unaccountably included in its findings was the fact that Mr. Bartow was present at the second sale (JA 142), although there was no evidence that he represented Mr. Sheridan at that time (JA 100), was not originally counsel in this case and sat in at trial only upon the assumption gained in a conference in chambers that he was not a witness to anything of possible relevance (JA 145-146).

Why?

The trustees were the last witnesses to testify. Most of the foregoing facts were already in evidence. In the course of Mr. Scrivener's testimony it had become obvious that the trustees and Perpetual's officers were inseparable in their dealings with every phase of this matter. The trustees did not even keep a separate file of their own (JA 92-94). Yet no one ever once consulted Sheridan, advised him of anything that was happening, and the only communications with him had been printed copies of the notices of foreclosure (JA 100-101). Explaining why Sheridan was thus so meticulously ignored, Mr. Scrivener said (JA 101):

> "Well, Mr. Sheridan was sort of out of it. . . . he was out of the picture. He didn't even own it."

The court immediately pressed the inquiry about what he meant by Sheridan being "out of it" (JA 101-102):

> " . . . your statement astounds me . . . It could be given the implication that you weren't in the slightest concerned with Mr. Sheridan or his interest."

Mr. Scrivener unexpectedly took up the challenge:

> "well, let's examine that just a moment. . . If we had sold the property for $20,000, I don't believe that he would have benefitted and if we sold it for $10, it is not our practice or policy to sue for a deficiency."

Yet as the court immediately noted, and Mr. Scrivener agreed (JA 102):

> "Well, in this case you took a deposit and applied it towards the note."

Later the court again inquired of Mr. Scrivener as follows (JA 107-109):

> THE COURT: . . . in this particular case, after the first sale and the difficulties that arose, you consulted one cestuis, namely, the Perpetual, constantly, but apparently you never even got in touch with, consulted, or gave any consideration to the other cestuis, the maker of the note. Now why is that?
>
> MR. SCRIVENER: It seems to me, Your Honor, that his interest was solely financial, that his obligation, if any, would come into being, you might say, depending entirely on one

thing, which was the price received at the foreclosure sale . . . If we got a sufficiently high price --

THE COURT: Did you have any greater obligation to the Perpetual? They were likewise interested simply in the highest price, at least up to the value of this property, were they not, for their Deed of Trust note?

MR. SCRIVENER: Yes I think that's right.

THE COURT: And yet, you saw fit to consult with them constantly and, yet, so far as your testimony goes, you have never yet consulted with this maker of the note, to whom you owed a duty. You have never asked him whether or not you should forfeit the deposit on the first bid, you never asked him if he wanted to advance the funds to sue, or what he would prefer you to do; not that you would be bound by it in the slightest, but you are consulting one cestuis and not the other, and that puzzles me.

MR. SCRIVENER: Well, I believe that at first, and the second sales, number one, Mr. Sheridan was advised that there would be one. Either Mr. Sheridan or his representative was there. I believe that they possibly had some obligation with respect to their own interests.

THE COURT: Maybe they did, but Perpetual knew the sale was there, too, and Perpetual knew what the situation was and, yet, you saw fit to consult Perpetual about whether you would forfeit the deposit or go ahead and sue, but your other cestuis, to whom you owed an equally high duty, it seems to me, you completely ignored.

MR. SCRIVENER: Well, it seems to me, also, Your Honor, that Mr. Sheridan, and subsequently the 1823 Corporation, had our money, the Association's money.

THE COURT: It didn't have any cent of your money as a Trustee, not one single, solitary penny.

The only evidence following this was the testimony of the other trustee, Mr. Crowell (JA 110-121), who took nothing away from the force of these remarks but added, among other things, that he and Mr. Scrivener are still acting as trustees in foreclosures for Perpetual (JA 119).

Notwithstanding his interest in the foregoing subjects, the court refused to make findings on any of them and entered judgment for defendant dismissing the complaint except as to the recovery at the first

trial[8] (JA 135-142, 143).

STATEMENT OF POINTS

The court erred in the following respects:

1. In failing to make findings of fact on relevant issues.

2. In failing to make findings of fact as requested by plaintiff.

3. In relying upon irrelevant findings of fact.

4. In failing to enter judgment for plaintiff.

5. In entering judgment for defendant.

SUMMARY OF ARGUMENT

The defendants failed to carry the burden of proof imposed upon them by reason of their conflicting interests. They failed to demonstrate, under the standard of very close scrutiny announced in the previous opinion of the court in this case, that they had discharged their obligations in respect of the following matters:

1. There was no finding, and no evidence, of a full and fair disclosure to Sheridan of the trustees' conflicting interests. This "duty of

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[8] Not until the day of the first trial did defendants admit owing plaintiff anything, and the $1,242.77 they finally agreed was due him had been withheld for more than two years. Yet recovery was without payment of either interest or costs (JA 39-40, 41). At the second trial the unrecovered balance lost by Mr. Sheridan was as follows:

"Leo G. Sheridan and Perpetual Building Association as interests may appear" June 19, 1958, when seized by Perpetual		$ 4,427.26
Paid Sheridan, November, 1960		1,242.77
Balance		3,184.49
Interest on $4,427.26 @ 6% from June, 1958 to November, 1960	$641.93	
Interest on $3.184.49 @6% from November, 1960 to October, 1962	382.14	1,024.07
Unrecovered balance to end of October 1962		$ 4,208.56

disclosure is not discharged by leaving the cestuis to draw doubtful inferences, conclusions and suspicions . . ." **Earll** v. **Picken**, 72 App. D.C. 91, 99, 113 F.2d 150.

2. There was no finding, and no evidence, that the trustees acted **diligently** in discharging any of the duties imposed on them by trust ownership after notice of serious defaults, property deterioration, abandonment and vandalism in April of 1957. Neither was there evidence establishing their **prudence** in permitting surrender of the right to hold the purchaser at the first sale liable for the very substantial loss resulting on the second, there being no reasonable prospect that the second sale would produce more than the first so as to warrant the gamble of "forfeiting" the deposit as liquidated damage.

3. There was no finding and no evidence disproving **improper delegation** of important decisions under the guise of passing on "clerical details" to the corporate treasurer of Perpetual. Certainly their constant interchange of information and advice with Perpetual was in sharp contrast to their complete **failure to inform** Sheridan of "action upon their part which would prejudice [his] rights." **Young** v. **Howard**, 73 App. D.C. 340, 120 F.2d 712.

4. There was no finding, and no evidence, that the trustees were **impartial**. By their conduct as well as their own admission they demonstrated that they had in mind "the interests of one of the parties only, and [were] indifferent to the rights of others." **Flynn** v. **Brooks**, 70 App. D.C. 243, 105 F.2d 766. Thus, the answer to this court's question on the previous appeal,

> "Whether the trustees formed any reasoned conclusions as trustees concerning their obligations to Sheridan,"

must be in the affirmative. Their conclusion was that they had no obligation to Sheridan because he was "out of it."

Finally, having excluded Sheridan's interests from their consideration "because it was neither the practice nor the policy of Perpetual to sue for a deficiency," defendants were estopped to seize the money in

this Joint Account. Such seizure was unauthorized by the terms of the account itself, by the terms of the deed of trust, by the terms of the insurance policy, by the terms of the check for the proceeds of the policy, and by the long continued recognition of the assumption by Schnitzer. Perpetual could resort to the account proceeds in the event of a deficiency only. By specifically excluding Sheridan's interests from their consideration on the basis that he would not be liable to a deficiency, they were estopped to hold him to one later.

It will be seen from all of the foregoing that the initial conflict of interest shown on the meager record in the former appeal has now been filled in to demonstrate violations of practically every known fiduciary responsibility: nondisclosure of conflicting interest, lack of diligence, lack of prudence, improper delegation, failure to inform beneficiary of actions affecting his rights, and finally a frank admission of complete indifference to the rights of one beneficiary. These things taken together do in fact "just blast this whole system," to borrow the pointed phrase of the trial judge. This court should therefore return to the ancient principles of **Chowning** v. **Cox**, 1 Rand. (22 Va.) 306, 10 Am. Dec. 530, the earliest American case on this subject followed in **Spruill** v. **Ballard**, 61 App. D.C. 112, 58 F.2d 517, and other cases in this court, absolutely prohibiting this meritricious relationship between creditor and trustees.

ARGUMENT

Early cases in the District of Columbia are replete with language and rulings indicating an absolute prohibition against any action by a creditor-dominated trustee. **Holman** v. **Ryon**, 61 App. D.C. 10, 13 (1932), 56 F.2d 307, **Spruill** v. **Ballard**, 61 App. D.C. 112 (1932), 58 F.2d 517, **Kent** v. **Livingstone**, 65 App. D.C. 291 (1936), 83 F.2d 316. This rule was mitigated in later holdings only upon it being established that a full and fair disclosure of the trustee's connection with the lender had been made and the borrower had knowingly acquiesced in the situation. **General Auto Truck Company** v. **Rust**, 66 App. D.C. 392, 88 F.2d 774, **Realty Investment**

Corporation v. **Rust**, 71 App. D.C. 213, 109 F.2d 456. In **Earll** v. **Picken**, 72 App. D.C. 91, 112 F.2d 150, it was clearly set forth that 'No half-hearted disclosure or partial discovery is sufficient. . . The trustee's duty of disclosure is not discharged by leaving the cestuis to draw doubtful inferences, conclusions and suspicions. . ." (p. 99).

Here, there was not even the beginning of a disclosure of the conflicting interests shown by the evidence. The court seems rather to have overlooked the ruling in this case that the burden of proof was upon the defendants. The failure of the plaintiff to testify, if not completely justified by his advanced years and ill health, certainly cannot fill in gaps in the case of the party bearing the burden of proof.

Likewise, they failed to demonstrate any diligence whatsoever in discharging the duties which devolved upon them after notice of serious defaults, property deterioration, abandonment and vandalism in April of 1957. Yet all trustees owe a duty of diligence and reasonable care. Restatement of Trusts, §174, **President and Directors of Georgetown College** v. **Hughes**, 76 App. D.C. 123, 125 and note 4, 130 F.2d 810; **Wellens** v. **Perpetual**, D.C. Mun. App., 184 A.2d 36, 38. Especially in regard to the contract of sale obtained at the first foreclosure they held an important responsibility of care and prudence in choosing the several alternative courses of action open to them. See Jones on Mortgages, 8th edition, Indianapolis, Volume 3, §2292, p. 798 et seq. and the leading case there cited, **Sherwood** v. **Saxton**, 63 Mo. 78, 82, holding that a bidder cannot be released unless it is "clearly advantageous" to the trust. The course presumably chosen, if selected with any conscious deliberation at all, could only be justified upon the assumption that a second sale would bring **more** than the first. The liquidated damages of $500, were actually less than the costs of the resale (JA 40), and if not forfeited could be retained and applied to the substantial loss which eventually resulted on a resale. **Sheffield** v. **Paul T. Stone**, 68 App. D.C. 378, 98 F.2d 250. In the circumstances shown here there was not even a gambler's chance of a higher price.

The complete intermingling of duties between the trustees in their capacity as such, the trustees in their capacities as servants of Perpetual, and the actions of other servants of Perpetual are impossible to separate on this record. At the very minimum it shows an improper delegation giving rise to liability under the principle of the Restatement of Trusts, § 171, and **Washington Loan and Trust Company** v. **Colby**, 71 App. D.C. 236, 240, 108 F.2d 743. But it shows a great deal more in contrast to their complete failure to inform Sheridan of any of the actions on their part affecting his rights -- their decision to abandon any claim against the purchaser at the first sale, not to retain counsel about this matter, the terms of the second sale, the seizure of his deposit, the fact that the second sale would be free of the tax lien. None of these things were brought home to Sheridan. This in and of itself is a breach of trust. **Young** v. **Howard**, 73 App. D.C. 340, 120 F.2d 712. If the measure of the duty to communicate is the amount of information passing between the trustees and Perpetual, this trust was breached almost daily.

By their conduct as well as by their own admission, the trustees demonstrated that they had in mind "the interests of one of the parties only, and [were] indifferent to the rights of others," **Flynn** v. **Brooks**, 70 App. D.C. 243, 105 F.2d 766. When this case was before this Court before, it was remanded for an answer to the following question among others:

> "Whether the trustees formed any reasoned conclusions as trustees concerning their obligation to Sheridan."

Whether they did as trustees or not would be difficult to ascertain on this record, but this record now clearly and unmistakably shows that a reasoned conclusion was formed. That conclusion was that the trustees had no obligation to Sheridan.

This was not only a reasoned conclusion, it was a well reasoned conclusion: Sheridan was "out of it." He could not reap any possible surplus on the sale because he had sold the property long ago. Nor could he possibly suffer any loss, because "it was neither the practice nor the policy of Perpetual to sue for a deficiency" (JA 102). For this reason Sheridan

was excluded from the trustees' considerations entirely while the Perpetual officers and directors were in more or less constant attendance upon the problem. It would seem, therefore, that in equity and good conscience, those who participated in the councils -- Perpetual, its officers, directors, and trustees -- should be estopped from ever claiming a deficiency from Sheridan, since this is the precise reason he was excluded from their select circle.

Nevertheless, when this select group who had consciously and deliberately excluded Sherican from all their social and business gatherings on this matter finally decided on a second foreclosure sale, they decided at the same time that they would take all the money he had on deposit with them. There is not a shred of evidence about an agreement which would give them this right. There is no question that under **Eastern Trust and Banking Company** v. **American Ice Company**, 14 App. D.C. 304, 334, that Perpetual had "an equitable lien" upon these monies. But it is equally plain that this lien could not be perfected by seizure of such funds before any deficiency had been established by foreclosure. **Hoffman** v. **Sheahin**, 73 App.D.C. 374, 377, 121 F.2d 861. The very titling of the account placed it under control of both parties. Certainly the check with which the account was created could not have been negotiated with one signature only. The actual terms of Perpetual's interest, contained in the fire policy, was not produced although it was written by Perpetual, under the direction of Perpetual, through an agency owned by all the directors of Perpetual and in a company in which the president of Perpetual was also an officer, director and substantial stockholder. Cf. **Wellens** v. **Perpetual**, D.C. Mun. App., 184 A.2d 36, 38. Finally, Perpetual knew that Schnitzer had assumed Sheridan's obligation, and while they were not bound to recognize this assumption, they had in fact acted upon it and treated Schnitzer as primarily liable, and Sheridan only secondarily so. Cf. stated exceptions to the Rule of **DeLeon** v. **Rhines**, 64 App. D.C. 73, 74 F.2d 477, and cases collected.

In the light of Perpetual's well-known practice of making a bid at all sales which cover the amount of its outstanding indebtedness as well as the cost and expenses of the sale, shown by this record, and previously noted in this court's opinion in **Admiral Company** v. **Thomas**, 106 U.S. App. D.C. 266, 268, 271 F.2d 849, the seizure of plaintiff's joint account with Perpetual was for all practical purposes the guarantee of its loss. In any event it went to reduce an obligation on property he no longer owned and to benefit people who were complete strangers to him: subsequent purchasers and lienholders.

If this is the consequence of being "out of it," Sheridan is indeed fortunate that he was not "in it."

But defendants cannot blow hot and cold with a trust beneficiary's rights. They cannot take the position that Sheridan would not be held liable for a deficiency when it was convenient to exclude him from their councils, and then turn right around and take his money to satisfy a deficiency determined by them in advance without trial and without notice. They are estopped to practice such disingenuousness.

All of the foregoing circumstances bring us back to the point raised on petition for rehearing en banc in the original appeal here, No. 16,167. What was there only hinted at, and deductively projected, has now been inductively established. The fruits of the basic conflict of interest are all too apparent: nondisclosure, lack of diligence, lack of prudence, improper delegation, failure to keep beneficiaries informed, and finally a frank admission of complete indifference to their rights, completely forgotten however when it comes to pressing the interests of the creditor against the borrower. Thus it will be seen that something more than the ordinary rule of full explanation and shifting the burden of proof is appropriate in this area. A third element, not present in other fiduciary relationships, is involved here. This was recognized years ago when the whole subject was first considered on this continent. The reason for the control of

mortgages by courts of equity is the maxim:

"The borrower is a slave to the lender."

These are the words of one of the earliest American cases on this subject, **Chowning** v. **Cox**, 1 Rand (22 Va) 306, 10 Am. Dec. 530, an 1823 Virginia case which was the principal authority upon which this court relied in **Spruill** v. **Ballard**, 61 App. D.C. 112, 58 F.2d 517. These two cases and the authorities cited in them illustrate the whole history of mortgages and deeds of trust. The Law of Real Property, by Professor Richard R. Powell of Columbia University, Bender, New York, 1952, Volume 3, Page 550, Note 25, and Page 554; Mortgages, Deeds of Trust, and Other Security Devices as to Land, by Professor Gerrard Glenn of the University of Virginia, Mitchie, Charlottesville, Virginia, 1943, Volume 1, Sections 20, 98, 98.1. Cf. Article 66, Section 5, Md. Code, 1957 Ed. which requires the exercise of all powers of sale be under judicial auspices. It will be seen, for example, that since the time of Charles I in the seventeenth century and before, no mortgage would be effective to transfer a title so as to foreclose the owner's equity of redemption without the intervention of a court of equity. This was not because the owner failed to agree to such an arrangement for he invariably did so. Equity did not intervene because of some nonconsent on his part. It intervened to prevent a forfeiture -- an unjust bargain entered into with eyes wide open.

In the early part of the nineteenth century, both in this country and in England, there was some indication that a custom had grown up which permitted a creditor to exercise a power of sale conferred upon him in a mortgage. However, such a practice was roundly condemned in England by Lord Eldon and in this country by Judge Cabell of the Court of Appeals of Virginia in the **Chowning** case.

Lord Eldon referred to such a deed as

> "Very extraordinary . . . upon which it would be difficult to induce a court of equity to act." (As quoted in Jones on Mortgages, § 2286)

In the **Chowning** case Judge Cabell was troubled by no penchant for English understatement for he declared that to permit such an arrangement ". . . would be contrary to the clearest principles of natural justice" -- making the creditor arbiter of his own case.

That a man should execute such a deed only proved the maxim that "The borrower is a slave to the lender," making it necessary for a court of equity to intervene to protect men from their own folly.

In the latter part of the 19th Century however, notwithstanding these authorities, some courts permitted the exercise of the power of sale by a creditor without the intervention of a court of equity, assigning as their reasons "the convenience to the creditor" and a rather extreme view of the importance of freedom of contract.

The deed of trust answers this problem with a happy compromise. The essential point of a deed of trust as distinguished from a mortgage is simply that the repository of title is a disinterested party rather than the mortgagee. Therefore it is reasonable to permit an out-of-court sale with resultant convenience to the creditor, while at the same time preventing the oppression of the debtor by the intervention of this disinterested third party.

But the key to all of this is the disinterestedness of the trustee. Once the trustee is subjected to the influence of the creditor, the whole transaction becomes nothing more than a mortgage which cannot be foreclosed without the intervention of a court of equity.

The wisdom of the past is as decidedly modern as **United States** v. **Mississippi Valley Generating Company**, 364 U.S. 520 (The "Dixon-Yates" case). What was said there concerning conflicts of interests in government dealings is true here: ". . . The objection to them rests in their tendency, not in what was done in the particular case . . . The court will not inquire what was done. If that should be improper it probably would be hidden and would not appear . . ." (p. 550, n. 14). There is continuous recognition of this throughout American judicial history in such cases as

Michaud v. **Girod**, 4 Howard 503; **Magruder** v. **Drury**, 235 U.S. 106, 37 App. D.C. 519; **Jackson** v. **Smith,** 254 U.S. 586 reversing 48 App. D.C. 565. Such departures from the mainstream of judicial thought as were made in the late 19th Century in the name of creditor convenience are best answered by the famous remarks of Justice Cardoza in **Meinhard** v. **Salmon**, 164 N.E. 545, 546:

> "A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. . . . Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. . . ."

Experience and principle demonstrate that warnings and criticism of the creditor-dominated trustee are not enough. It should be unconditionally outlawed in the District of Columbia.

CONCLUSION

The facts and circumstances of this case, now fully laid on the court record "just blast this whole system" in the pointed phrase of the trial judge. This Court should therefore reverse the dismissal of the complaint and remand this case with instructions to enter judgment for the plaintiff for the full amount of his loss.

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BRIEF FOR APPELLEES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,561

LEO G. SHERIDAN,

Appellant,

v.

PERPETUAL BUILDING ASSOCIATION,
JUNIOR F. CROWELL,
Individually and as trustee,
SAMUEL SCRIVENER, JR.,
Individually and as trustee,

Appellees.

Second Appeal from the United States District Court
For the District of Columbia

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QUESTIONS PRESENTED

In the opinion of the appellees, the questions presented on this appeal are:

1. Did the trial court err in finding that the trustees acted properly and with due regard for the interest of all parties concerned in electing to forfeit the high bidder's deposit as liquidated damages after the first sale and to resell the property at a subsequent foreclosure sale?

2. Did the trial court err in concluding that the Treasurer of Perpetual Building Association acted properly and in accordance with the contract between the appellant and the Perpetual Building Association in applying the balance of the insurance fund in its hands to reduce the deficiency in the repayment of the loan?

3. Having assigned away his interest in the insurance fund, did appellant have any standing as the real party in interest to bring this lawsuit?

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Appellees.

Second Appeal from the United States District Court
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BRIEF FOR APPELLEES

COUNTERSTATEMENT OF THE CASE

On December 2, 1952, Leo G. Sheridan (hereinafter called "appellant") borrowed $13,500.00 from the Perpetual Building Association (hereinafter called "Perpetual"), giving a promissory

note payable to Perpetual in monthly installments (J.A. 35, 46-a) secured by a deed of trust on the premises at 1743 18th Street, N.W., Washington, D.C. (J.A. 36, 43-46). Samuel Scrivener, Jr. and Junior F. Crowell, (hereinafter called "Scrivener" and "Crowell" or "Trustees") were named as Trustees in the deed of trust (J.A. 36). Scrivener is an officer and director of Perpetual and Crowell is manager of Fidelity Investment Company, a partnership, the members of which are directors of Perpetual (J.A. 36). The deed of trust provided, among other things, that the improvements on the realty should be insured and that the Treasurer of Perpetual would have the right to apply the proceeds to "any deficiency in repayment of the loan" (J.A. 45). In February, 1955, the premises were partially destroyed by fire and a check for $9,713.41 for fire damage was issued by the insurer. In April 1957, this check was deposited in an account at Perpetual in the names of appellant and Perpetual "as their interests may appear" (J.A. 37). In November, 1955, appellant sold the property to one Shirley L. Schnitzer. It was agreed between the parties that the sale would not affect the fire insurance fund (J.A. 37). Various disbursements were made from the insurance account as the work of repairing the property progressed (J.A. 38). Appellant assigned $3,655.63 of his interest in the insurance fund to Samuel J. Gorlitz on February 28, 1957 (J.A. 134-e, 134-f), and $3,300.00 of his interest in the fund to Bartow Realty Company on June 26, 1957 (J.A. 157-159 Def's Exh. 16a, 16b).

Appellant was delinquent in the payments on his promissory note from the inception of the loan (J.A. 62-a). Notices of intent to foreclose were frequently sent but before Perpetual took any further action with respect to foreclosure some payments were made (J.A. 62-a, 63). Finally in December, 1957, no payments having been received since August 19, 1957 (J.A. 47) Perpetual asked the trustees

to sell the property (J.A. 63). At the foreclosure sale on January 3, 1958, the high bid of $12,050.00 was made in behalf of Colonel Kenneth S. Dumond (J.A. 39).

Because of a dispute about the terms of sale, the circumstances of which will be discussed in more detail below, Colonel Dumond did not purchase the property and the trustees forfeited his $500 deposit (J.A. 39). The property was sold at a second foreclosure sale on July 9, 1958, to one Helen B. Brent for $9,550.00 (J.A. 39). Prior to the second foreclosure sale Perpetual caused the balance of the insurance fund, $4,427.26, to be applied to the deficiency in repayment of the loan.

Appellant brought suit in the District Court praying for an accounting of the insurance proceeds. The case was tried on stipulated facts and documents and judgment was entered for the plaintiff in the amount of $1,242.77, which defendants admitted to be owing, and for the defendants on the remainder of the claim (J.A. 40-41).

An appeal was taken and, on February 1, 1962, this Court sitting in banc reversed and remanded. 299 F. 2d 463, 112 U.S. App. D.C. 82. This Court held that because of the close connection between the trustees and Perpetual, the decision made by the trustees to forfeit the deposit of the purchaser at the first foreclosure sale and resell the property should be scrutinized very closely in order to determine "whether the trustees formed any reasoned conclusions as trustees concerning their obligation to Sheridan" and whether "they considered whether or not to take advantage of the alternative remedies against a defaulting purchaser given by the deed of trust." 299 F. 2d. 465, 112 U.S. App. D.C. 84.

At the second trial appellees, by their counsel, voluntarily assumed the burden of going forward with the evidence to the end that they would subject themselves to a complete examination of all their acts and conduct. Appellees produced the testimony of both of the

trustees, Scrivener (J.A. 82-110) and Crowell (J.A. 100-121), Ernest A. Thomas, Treasurer of Perpetual (J.A. 62-a-81), Richard W. Israel, the auctioneer who presided at both foreclosure sales in question (J.A. 82) and Jules Fink, the attorney who represented the purchaser at the first foreclosure sale (J.A. 60-62). Appellant produced no witnesses and did not testify himself. At the conclusion of all of the evidence the trial court made detailed findings of fact (J.A. 135-142) and conclusions of law (142-143) and entered judgment in favor of appellees. From that judgment this appeal is now brought.

Appellant, in his brief, has discussed the evidence in great detail and indicated his dissatisfaction with the trial court's findings of fact. Believing that it is the function of an appellate court not to retry the case in its entirety but rather to determine, under the proper standards, whether the trial court has erred in making its findings of fact and conclusions of law, appellees will not restate herein all of the evidence adduced at trial, but will concentrate upon the action taken by the trustees subsequent to the first foreclosure sale.

At the foreclosure sale on January 3, 1958, the high bid of $12,050.00 was made in behalf of Colonel Kenneth Dumond, who made a deposit of $500.00 (J.A. 67, 85, 112-113; Finding 11, J.A. 140). Thereafter, Colonel Dumond's attorney, Mr. Jules Fink, attempted to have the tax lien released (J.A. 60-a; Finding 11, J.A. 140). Mr. Fink had a number of appraisals of the property made which tended to show that the U.S. tax lien was valueless (J.A. 60-a, 134-a through 134-e). At this time there was an uncertainty in the law with respect to the status of a Federal tax lien against property foreclosed under a prior encumbrance (J.A. 60-b, 60-c). * The Internal Revenue Service,

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* This uncertainty was, to a great extent, cleared up two years later in the case of United States v. Brosnan, 363 U.S. 273, 4 L. Ed. 1192 (1960), in which the Supreme Court held that a foreclosure sale pursuant to a prior recorded encumbrance under state law had the effect of extinguishing a U.S. tax lien.

however, refused to release the tax lien (J.A. 60-a). Accordingly, Mr. Fink stoutly asserted that his client was not required to purchase the property. On February 18, 1958, he wrote Perpetual and demanded the return of Colonel Dumond's $500 deposit (J.A. 49-50). The trustees, faced with this demand, were required to elect one of the three remedies available against the purchaser, set forth in the notice of sale, as follows:

> "To resell the property at the risk and cost of the defaulting purchaser, after five days' advertisement of such resale in some newspaper published in the District of Columbia, or deposit may be forfeited or without forfeiting deposit, trustees may avail themselves of any legal or equitable rights against defaulting purchaser" (J.A. 49; Finding 11, J.A. 140-141).

The trustees in considering which course of action to follow took into account the fact that Colonel Dumond was stationed at a secret Army installation in Pennsylvania and that the bringing of suit against Colonel Dumond would thus entail considerable expenses and attorneys' fees and a possible difficulty in obtaining service of process (J.A. 85, 118-119). They were also aware of Colonel Dumond's vigorous contention that he was not obligated to purchase the property and was entitled to a return of his deposit (J.A. 86). The trustees had no reason to believe that the property would not bring as much at a subsequent foreclosure sale (J.A. 86-87). Accordingly, the trustees determined that the best course of action would be to forfeit the deposit, and this forfeiture was regarded by all parties as liquidated damages for the compromise of a disputed claim (J.A. 60-b, 86). This decision was communicated to Mr. Fink on February 26, 1958 (J.A. 51), and the forfeiture was acknowledged by Mr. Fink on March 5, 1958 (J.A. 52). Subsequently, Perpetual attempted to have the Federal tax lien removed (J.A. 134-f-134-p). When this attempt proved unsuccessful (J.A. 134-p-q) Perpetual assumed the risk of satisfying the tax lien (J.A. 68) and the property was again advertised and sold, free of the Federal tax lien, for $9,550.00 on July 9, 1958 (J.A. 114; Finding 14, J.A. 142).

The facts set forth in the above paragraph, i.e., the trustees' decision to forfeit Dumond's deposit rather than to sue him for specific performance or resell the property at his risk, and the application of the insurance proceeds to the deficiency in repayment of the loan, are the two salient points in the long series of transactions among Sheridan, Perpetual and the trustees. These two actions, the one taken by the trustees and the other taken by Perpetual, are the alleged causes of appellant's claimed pecuniary loss. Accordingly, this Court must focus its attention upon these two points and must determine, under the proper standards of review, whether the lower court erred in finding that the trustees and Perpetual acted properly.

RULES INVOLVED

Federal Rules of Civil Procedure:

Rule 17.

"(a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest * * *."

Rule 52. Findings by the Court

"(a) * * *. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses * * * ".

SUMMARY OF ARGUMENT

1. The trial court's conclusion that the trustees, in electing to forfeit the purchaser's $500 deposit as liquidated damages and to resell the property, acted as ordinarily prudent trustees who were cognizant of their duties to all persons to whom they owed a fiduciary obligation, was based upon substantial evidence and upon the trial court's findings of fact, which findings of fact were not "clearly erroneous." Accordingly, the court should sustain the trial court's findings and its conclusion upon this issue.

2. The trial court was correct in concluding that the Treasurer of Perpetual Building Association acted properly and in accordance with the contract between the plaintiff and Perpetual in applying the balance of the insurance fund to reduce the deficiency in repayment of the loan. Moreover, both Perpetual and the trustees were under an obligation, pursuant to the equitable doctrine of "marshalling of assets", to seek satisfaction of appellant's debt to Perpetual out of the insurance fund, in which Perpetual alone had a security interest, before going against the real estate upon which many other persons had liens.

3. The record fails to show Sheridan has any actual pecuniary interest in the insurance fund held by Perpetual. He had assigned all of his interest therein to Bartow Realty Company and to Samuel J. Gorlitz and the record contains nothing to explain why Sheridan is the plaintiff or how, in any event, he can claim to be the real party in interest.

ARGUMENT

I

The Trial Court's Findings and Conclusions With Respect to The Trustees' Election of Remedies Against The Purchaser At the First Foreclosure Sale Should Be Sustained

The trial court, in Finding of Fact No. 11 (J.A. 140-141), stated that the three courses open to the trustees, after Colonel Dumond had asserted that he was under no legal obligation to comply with the terms of sale and demanded the return of his $500 deposit, were as follows:

"(1) to sell the property at the risk and cost of the defaulting purchaser, holding the deposit to cover any deficiency in the second sale over the first sale; (2) to sue the defaulting purchaser for a specific performance; (3) to forfeit the deposit as liquidated damages and apply the forfeited deposit to the cost of the first sale and any balance to the note. The defaulting purchaser was in the Army, and he lived in Pennsylvania where he was stationed at a secret installation. The trustees concluded that to proceed under courses (1) or (2) would have entailed bringing an action against the defaulting purchaser in Pennsylvania, with possible difficulties of obtaining service on the defaulting purchaser, and with the outlay of substantial court costs and attorneys' fees. In view of these circumstances, the trustees and Mr. Thomas of the Perpetual Building Association decided that it would be to the best interest of all of the parties concerned to adopt course (3) and forfeit the deposit. At this time, the trustees had no reason to believe that the property would bring less at a second sale than at the first sale, and there was reason to believe that if they could get the United States to relinquish their tax lien on the property that it would bring more at the second sale than at the first" (J.A. 140-141).

The appellant has assailed the above quoted finding of fact by the trial judge in his so-called statement of the case, which is in reality an attempt to retry the facts of the case before this Court (Br. 8-10). In his argument, appellant asserts, contrary to the trial court's finding, that "in the circumstances shown here, there was not even a gambler's chance of a higher price" (Br. 17). Since appellant has made an assertion directly contrary to the trial court's finding of fact, the question then arises: what standard should this court use in reviewing a lower court's finding of fact? Rule 52(a) of the Federal Rules of Civil Procedure provides that such findings "shall not be set aside unless clearly erroneous." Thus, this Court must decide whether the above quoted finding of the trial court is "clearly erroneous."

The "clearly erroneous" standard is applicable not only to basic historical facts but also to "inferences drawn from documents or undisputed facts." United States v. United States Gypsum Company, 333 U.S. 364, 394, 68 S. Ct. 525, 541, 92 L. ed. 746, 675 (1948); Commissioner v. Duberstein, 363 U.S. 278, 291, 80 S. Ct. 1190, 4 L. ed. 2d 1218, 1228 (1960); United States v. Yellow Cab Co., 338 U.S. 338, 70 S. Ct. 177, 94 L. ed. 150 (1949).

Appellant has not demonstrated, nor has he even argued, that the trial court's Finding No. 11, quoted in part above, is "clearly erroneous". On the contrary, the detailed Facts and references to the record set forth in the Counterstatement of the Case, supra, show that the trial court's Findings were based upon substantial evidence. Accordingly, the finding should not be set aside by this Court. The trial court's conclusion that the trustees formed a reasoned conclusion and were cognizant of their duties to all persons to whom they owed a fiduciary obligation was based upon this finding and, accordingly, should be sustained.

II

The Trial Court Correctly Concluded That Perpetual Was Authorized To Apply The Insurance Proceeds To Reduce The Deficiency In Repayment of The Loan

Appellant has argued that the application of the insurance fund on deposit with Perpetual was improper because it was made "before any deficiency had been established by foreclosure" (Br. 19; see also Br. 10, footnote 7). The deed of trust provided, with respect to insurance, as follows: "(5) that the improvements forming a part of said realty shall be insured to the satisfaction of the Treasurer, who shall have the right to designate the insurer and to apply the proceeds of such insurance, including any premium rebate, to any deficiency in

repayment to the Treasurer of any loan, additional amount or advance secured by this deed of trust" (J.A. 45; Finding 4, J.A. 137). After the premises were partially destroyed by fire the proceeds of the insurance policy were deposited with Perpetual Building Association in an account denominated "Leo G. Sheridan and Perpetual Building Association, as their interests may appear" (Finding 5, J.A. 137-138). The "interests" of Sheridan and Perpetual in this fund were those defined by the preexisting deed of trust.

Appellant conceded, both in argument before the trial court (J.A. 124) and in his brief (Br. 19) that the Perpetual Building Association had a lien on this insurance fund. The appellant takes the position, however, that this fund could not be applied to the deficiency in repayment of the loan until after a foreclosure sale. This assertion is controverted by the plain language of the deed of trust, pursuant to which the insurance funds were held, which provides that Perpetual may apply the proceeds of the insurance "to any deficiency in repayment." (Emphasis added). Appellant was bound by the terms of his promissory note to repay the loan in monthly installments (J.A. 46-a). As of June 19, 1958, the date when Perpetual applied the insurance proceeds, no payments had been made since August 19, 1957, a period of ten months (J.A. 47; Finding 13, J.A. 141; Br. 7). Clearly a "deficiency in repayment" had occurred which authorized Perpetual, under the terms of the deed of trust, to apply the insurance proceeds.

This reading of the quoted language of the deed of trust is supported by a case cited by appellant, Eastern Trust and Banking Company v. American Ice Company, 14 App. D.C. 304 (1899) (Br. 19). In this case the deed of trust to secure the payment of certain bonds held by the trust company and later conveyed to others for value, provided that the grantor should keep the premises insured and that, in case of loss, the proceeds of the insurance policy might "be applied

to the payment of the principal of such of the bonds as may be at the time due and unpaid" (14 App. D.C. 308). Subsequently, the property was destroyed by fire and, after several unsuccessful foreclosure sales, the trust company brought suit against the assignee of the obligor to foreclose and to account for the proceeds of the insurance policy. The court held that the proceeds of the insurance policy were payable to the trust company even though no deficiency had yet been determined by a foreclosure sale. The case of Hoffman v. Sheahin, 73 App. D.C. 374, 377, 121 F. 2d 861 (1941), does not stand for the proposition for which appellant cites it (Br. 19).

Appellant makes an attempt to bolster his argument by alluding to the fact that Perpetual was aware of the transfer of the property to Schnitzer (Br. 19). The appellant also refers to the debt which he owed to Perpetual as "an obligation on property" (Br. 20). Although appellant does not expressly say so, this is apparently an attempt to argue that a novation had taken place and that Sheridan was no longer the primary obligor on the note which he had made. This contention is utterly without foundation. Perpetual never agreed to such a novation and, therefore, is not bound in any way by the alleged assumption of Sheridan's debt. The case cited by appellant (Br. 19), DeLeon v. Rhines, 64 App. D.C. 73, 74 F. 2d. 477, held that an agreement by the creditor was the only way in which the principal debtor could escape his primary liability and become merely a surety. 64 App. D.C. 75, 74 F. 2d. 479.

Not only was Perpetual authorized to apply the proceeds of the insurance fund to the deficiency in repayment of the loan, it was obliged to do so by the equitable doctrine of "marshalling of assets." This rule was stated by the United States Supreme Court, as follows:

> " * * *. He who has a right to resort to two funds, in one of which alone another party has a subsidiary lien, shall be compelled to exhaust the one to which the other cannot resort before coming upon the one in which they both have an interest. * * *." National Savings Bank v. Creswell, 100 U.S. 630, 641, 25 L. ed. 713, 715 (1880).

See also Jackson v. Finance Corporation of Washington, 59 App. D.C. 309 313, 41 F. 2d. 103, 107 (1930).

Perpetual had a lien on the insurance proceeds (J.A. 124) and upon the real property. The latter, however, was also subject to many other liens in the aggregate sum of approximately $39,000.00 (J.A. 139). It was, therefore, incumbent upon Perpetual to apply the insurance proceeds to the payment of appellant's debt before proceeding against the property in which other creditors had a security interest.

III

Appellant Has No Right In The Insurance Fund Because He Has Assigned Away His Interest Therein

On February 28, 1957, appellant assigned $3,655.63 of his interest in the insurance fund to Samuel J. Gorlitz and notice of this assignment was communicated to Perpetual (J.A. 134-e, 134-f). On June 26, 1957, appellant assigned his interest in the insurance fund, to the extent of $3,300.000, to the Bartow Realty Company as security for a loan (J.A. 157-158, Def's Exh. 16-a). Perpetual was notified of this assignment on behalf of Bartow Realty Company by Norman H. Bartow, one of appellant's counsel (J.A. 159, Def's Exh. 16-b). There is no evidence that either of these assignments was ever rescinded. The remainder of the insurance fund is only $3,184.49 (J.A. 40), less than the amount of either assignment appellant has made. Accordingly, appellant has no real interest in the fund and thus no standing to complain of its alleged loss. An action must be brought in the name of the real party in interest, Rule 17(a) Federal Rules of Civil Procedure, and in determining the identity of the real party in interest "courts look through the shadow to the substance" Heiskell v. Mozie, 65 App. D.C. 255, 257, 82 F. 2d 861, 863 (1936). On the face of this record appellant has assigned away all possible remaining interest in the insurance fund and is only a "shadow" party to this proceeding.

CONCLUSION

At the trial below, appellees came forward with extensive evidence in order to enable the trial judge, pursuant to the mandate of this Court, to scrutinize closely all that they did in connection with the foreclosure under the deed of trust. Appellant produced no witnesses nor did he testify himself. After a lengthy trial, Judge Hart found that the trustees had acted prudently and with due regard for the rights of all to whom they owed a fiduciary obligation and concluded that Perpetual was authorized to apply the balance of the insurance fund to appellant's debt. On this appeal, appellant carries the burden of showing that the trial court erred; he has not, and cannot, even begin to satisfy that burden. Moreover, the record clearly shows that the appellant has assigned away all his interest in the insurance fund and is not even a proper party in this case. Accordingly, the judgment below should be affirmed.

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REPLY BRIEF

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,561

AMELIA SHERIDAN, Administratrix of the
Estate of Leo G. Sheridan, Deceased,

Plaintiff-Appellant,

v.

PERPETUAL BUILDING ASSOCIATION,
JUNIOR F. CROWELL, individually and as trustee,
SAMUEL SCRIVENER, JR., individually and as trustee,

Defendant - Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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PERPETUAL BUILDING ASSOCIATION,
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Defendant-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF

Appellees' brief is concerned almost entirely with three fairly narrow legal points not touched upon in appellant's brief, or noted there only in passing. Thus, the counterstatement of the case does not add facts omitted so much as it subtracts from the "great detail" of appellant's statement. The few additional facts thereby emphasized, although

not referred to in the lower court's findings, are regarded by appellees as dispositive.[1]

It will be the purpose of this reply brief to demonstrate that defendant-appellees' three-part argument, reflected throughout their brief, interposes defenses essentially technical in nature which are completely inapplicable. In doing so it is necessary to stray a very considerable distance from the real issues raised by this case. Thus, we risk overlooking the broader context in which tiny fragments of questions properly belong, or even of mistaking the part for the whole. However, if it is established that these legalisms upon which defendants have elected to stand are groundless, there is significance beyond the usual inferences that flow from the introduction of false issues. Suspicion is not dispelled, nor judicial approval merited, by trustees who, when called upon to account, choose to ignore most of the facts and all the questions raised about their own conduct.

I. Plaintiff-appellant, following the pattern of this court's former ruling, has asserted that defendants did not carry their burden of proof and that the trial court did not subject their conduct to the careful scrutiny required. In particularization of this claim, plaintiff has pointed to a number of legal duties owed by defendants and to the absence of any finding of fact or evidence showing compliance with the standards of conduct specified. This is a sufficiently traditional basis of review not to be taken for "an attempt to retry the facts of the case."[2] Nor can defendants avoid discussing specific legal standards and applicable facts

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[1] They are principally concerned with an assignment of part of the insurance proceeds (Appellees' Brief, pp. 2, 12) and plaintiff's alleged delinquencies in paying installments prior to the assumption by Schnitzer (Appellees' Brief, p. 2; see, however, Defendant's Exhibit 3, JA 47).

[2] "Rule 52 has no application here. The District Court premised its ultimate finding . . . on an erroneous interpretation of the standard to be applied. . . . [W]e are reviewing a question of law, namely, whether the District Court applied the proper standard to essentially undisputed facts." U.S. v. Parke, Davis and Co., 362 U.S. 29, 43-44.

because they do not find the "clearly erroneous" phrase from Rule 52 (a).[3] It is entirely academic whether the review be labeled an exception or an application of Rule 52. The point is that the trial court's "evaluation of credibility has no significance."[4]

Here all the evidence was adduced by parties bearing the burden of proof on the issues under review. The vast bulk of it was undisputed and documentary. The balance consisted of testimony of the defendants themselves, which plaintiff may treat as admissions.[5]

Actually, most of the findings are accepted by plaintiff as far as they go. The few that are not are only relevant as an index to the closeness of the lower court's scrutiny.[6] None of the findings adequately demonstrate discharge of the specific legal duties drawn into question. Their significance, therefore, is in what they do not show.[7]

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[3] The phrase of Rule 52 (b) is "sufficiency of the evidence to support the findings." Cf. Saginaw Broadcasting Co. v. FCC, infra, note 7, "The court examines the evidence . . . to ascertain whether . . . findings are properly supported." But "evidence sufficient to support a jury verdict or an administrative finding may not suffice to support a trial judge's finding." Orvis v. Higgins, infra, note 4, at p. 540. See also Judge Frank's amusing footnote 7 to this statement.

[4] Dollar v. Land, 87 U.S. App. D.C. 214, 217-218, 184 F.2d 245, cert. denied 340 U.S. 884. This famous case, involving questions of pledges and mortgages is not without point to the merits of the case at bar. See p. 222. See also the balance of the text in the leading case of Orvis v. Higgins, 2 Cir. 1950, 180 F.2d 537, cert. denied 340 U.S. 810, quoted in Dollar v. Land and discussed with approval in 5 Moore's Federal Practice, 2d Ed. § 52.04.

[5] Orvis v. Higgins, supra, note 4. The situation is not unlike summary judgment. Cf. Burman v. Lenkin Construction Co., 80 U.S. App. D.C. 125, 126, 149 F.2d 827.

[6] The only conflict resolved by Findings 11 and 12 are conflicts in the testimony of the defendants themselves. It would be hard to ascertain from their testimony if and when they met, discussed, concluded, or decided anything (Appellant's Brief, pp. 8-9).

[7] "Our acceptance of the facts as found by the Tax Court does not require acceptance also of its conclusions of law. Regard [for that court] does not warrant avoiding our responsibility for reaching a decision of our own as to the application of the law to the facts . . ." D.C. v. Seven-Up Washington, 93 U.S. App. D.C. 272, 275, 214 F.2d 197. "[L]ack of the basic or essential findings required to support the . . . order" requires reversal. Saginaw Broadcasting Company v. FCC, 68 App. D.C. 282, 287, 288-289, 96 F.2d 554, cert. denied sub nom Gross v.

(continued on following page)

Although greatly impressed by important admissions made by the defendants on the witness stand, the trial judge apparently concluded that they lacked legal significance, for he excluded them from his findings of fact.[8] In one instance the trial court's conclusion that the trustee had "no reason" to believe a second sale might bring less than the first depends on omitting such "reasons" from his findings although shown by defendants' very specific admissions about the long duration of the vacancy, vandalism, etc.[9] But it is not even necessary to go into this since the trustees could only prudently declare a forfeiture if they "had reasons" to believe that a second sale would bring more than the first.[10]

Defendants gain no procedural advantage here by disdaining a discussion of their own evidence. The law lays down specific standards of conduct defendants must meet: duties of disclosure, diligence, prudence, non-delegation, impartiality, etc. Defendants say they "voluntarily" assumed the burden of proof at the second trial and boast of the number of witnesses called and documents produced. But there as here

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7 (continued from preceding page)
Saginaw Broadcasting Co., 305 U.S. 613. Lundregan v. Lundregan, 102 U.S. App. D.C. 259, 252 F.2d 823. "Even assuming [the findings] correctness arguendo, though, it is our judgment that they do not establish a case . . ." Dalehite v. U.S., 346 U.S. 15, 24.

8 The legal reasoning of the court is not disclosed by an opinion, but it is fairly obvious from the court's questioning of Mr. Scrivener (JA 100-110) and colloquy (JA 122-134) that plaintiff's proposed additions were unquestioned in point of fact, but were deemed irrelevant under the legal theory adopted by the court. He did not consider some findings "necessary," because "you have got an exhibit in there which shows it." (JA 130). In others, "The record will speak for itself" (JA 131), and still others, "What I will find will depend on exactly what he said" (JA 133). But the court made no finding on what the witness said, although embraced in plaintiff's requested findings 8, 10, 11, 12 and 13 (JA 148-150).

9 Appellant's Brief, pp. 7-9. Cf. Orvis v. Higgins, supra, note 4: "The trial judge . . . relied merely on negative testimony . . . , that is, that 'no witness even intimated that . . . intention. . . . But those same witnesses, unequivocally and without contradiction by any other witness, testified to . . . facts which we think lead to [that] conclusion." (p. 541). Cf. also U. S. v. Gypsum Company, 333 U.S. 364, 394: "The witnesses denied that they . . . had agreed to do the things which in fact were done. . . ." Also Dalehite v. U. S., 346 U.S. 15, 24, in n. 8: "Statements conclusory in nature are to be eschewed in favor of statements of the preliminary and basic facts. . . . In this particular case, no proper review could be exercised by taking the 'fact' findings . . . at face value."

10 Appellant's Brief, p. 17.

they have sought to pass judicial scrutiny by answering all the questions nobody asked. They seek to discharge their burden of proof by pointing to what their opponent has failed to show. But doubt is not their ally,[11] especially in a case such as this where an exacting standard must be met.[12]

II. Defendants observe that plaintiff "conceded" Perpetual had a "lien" on the insurance fund. Specifically, it was "an equitable lien" (Appellant's Brief, p. 19). Such a lien is enforced only according to its terms and only pursuant to a decree of an equity court, subject always to adjustment of other equities between the parties.

Eastern Trust and Banking Company v. American Ice Company, 14 App. D.C. 304, 334, stands for the general proposition that a covenant to insure for the benefit of a mortgagee creates such an equitable lien which defendants might have enforced according to its terms by resort to a court of equity. Wheeler v. Insurance Company, 101 U.S. 439, there cited at the page indicated in appellant's brief, stands for the further proposition that enforcement would only be decreet subject to equitable restrictions and conditions.

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[11] Where the burden is on defendants of "going forward with the evidence . . . the production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse. . . . Silence then becomes evidence of the most convincing character. . . ." Interstate Circuit v. U. S., 306 U.S. 208, 226, cited in support of passage in note 2, supra. Douglass v. Lehman, 62 App. D.C. 264, 265; Orvis v. Higgins, supra, note 4.

[12] "Even slightly suspicious circumstances can only be relieved by an assurance resulting from the closest scrutiny. It is in this context that we examine the record on appeal." America v. Sheehan, 92 U.S. App. D.C. 30, 202 F.2d 213; Cf. Enterprise Co. v. FCC, 105 U.S. App. D.C. 119, 265 F.2d 103; Cf. also Gonzalez-Jasso v. Rogers, 105 U.S. App. D.C. 111, 264 F.2d 584 and Schneiderman v. U. S., 320 U.S. 118, 148, 154, 158. Where conflicts of interest are involved, many authorities hold that no amount of explanation will be sufficient to relieve the trustees of liability. "The objection to them rests in their tendency, not in what was done in the particular case . . . If that should be improper it probably would be hidden and would not appear . . ." U. S. v. Mississippi Valley Generating Co., 364 U.S. 520, 550, n. 14, and other cases in Appellant's Brief, pp. 16-17, 20-23.

The specific provision in the Eastern Trust Company case required payment of the insurance to the trustees immediately upon the occurrence of a fire loss. The covenant here provides only for its recovery in the event of a "deficiency in repayment . . . of any loan" as distinguished from a "default," which warrants foreclosure only. Defendants drew the instrument and cannot profit from any lack of clarity in this respect, Williston on Contracts, 3d Edition (Jaeger) § 621. Similarly, if the insurance policy casts a different light on the matter, they might have produced it. But the payees on the check and the title of the account make it clear enough that Sheridan had a legal title to the fund, which defendants could not seize without the aid of a court of equity. Even then, the terms of their lien could not be enforced until after a deficiency in repayment had been determined and other equities between the parties adjusted.

The assertion that Perpetual was obliged to use the "insurance fund" to reduce the loan because of the equitable doctrine of "marshaling of assets," is completely misplaced. This doctrine is simply a method for determining priority of payment to creditors out of the property of a common debtor. The "Necessity of a Common Debtor" is loudly proclaimed by the big bold type of §4 of this topic in American Jurisprudence.[13] Never has it been known that "marshaling assets" means marshaling the assets of one debtor, Sheridan, to pay the debts of (or reduce liens against) another, Jefferson Place Company. Courts do not engage in this kind of Robin Hoodism.

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[13] Thus, in the cases cited by appellees, Jackson v. Finance Corporation, 59 App. D.C. 309, 313, 41 F.2d 103, 107, the common debtor of all persons was Finance Corporation. All creditors having security interests in the various parcels sought to be marshaled were creditors of a single debtor, Finance Corporation. Likewise, in National Savings Bank v. Creswell, 100 U.S. 630, 641, the common debtor was Brown. Who else having a lien on the 18th Street property did Sheridan owe money to besides Perpetual?

Not only was Sheridan a stranger to the purchasers from Schnitzer, but Schnitzer had assumed his obligation to pay Perpetual.[14]

Perpetual had no right to use Sheridan's money to pay the debts of Jefferson Place Corporation, or what comes to the same thing, using his money to enhance the value of liens against Jefferson Place Corporation for which he was not in the least responsible. Yet this was the net effect of seizing his account before a deficiency.

Enforcement of equitable liens and marshaling of assets are things that are, and must be, done under the supervision of a court of equity. If troubled by problems of this kind, defendants had a duty to submit themselves to court direction. They might profitably have done so in reference to other problems they encountered, including the tax lien. But Perpetual and its trustees do not constitute a high court for the District of Columbia which passes judgment on their own cases.

III. Now, some five years after the event and four years after being called upon to give an account of their stewardship, defendants drag up two old assignments by Sheridan to secure certain debts. Without asserting that these debts are still unpaid, and knowing full well that all of one (JA 145-146, 152-153) and at least most of the other (JA 77) have been paid, they say Sheridan had "no interest in the fund and thus no standing to complain of its loss." Of course, simple arithmetic will demonstrate that the total amount assigned still left a substantial balance of the fund owned by Sheridan. Furthermore, payment to one assignee affirmatively appears in defendants' testimony (JA 77), and knowledge of full payment of the other has been obtained off the record (JA 145-146, 152-153, Cf. Canon 25 of the Canons of Professional

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[14] Although not obliged to do so, Perpetual had affirmatively recognized and acted upon this assumption by Schnitzer. Consent is all that is required for it to become bound by the assumption of Schnitzer, thereby making Sheridan only secondarily liable as surety. DeLeon v. Rhines, 64 App. D.C. 73, 74 F.2d 477, mentioned in appellant's brief, p. 19, recognizes this but found it inapplicable to the facts of that case. See, generally, Williston on Contracts, 3d Edition (Jaeger) § 386.

Ethics of the American Bar Association; also Canons 17 and 19; also Canon 3 and JA 122). In any event, whether it knew the assignments had been discharged by payment or because it was not bound to recognize a partial assignment in the first place,[15] and had not done so, Perpetual ignored the assignment completely in making payments to Sheridan (JA 76-78, 138) and sending out notices (JA 63-65). It is simply another technical defense not pleaded, not proved, and insufficient.[16]

There is significance in defendants having raised this technical point, just as there is significance in its having raised many other technical points in this appeal, in the second trial, in the former appeal, in the first trial, and in all intermediate stages of these proceedings as docket entries in this court and the lower court amply demonstrate. It is a fair measure of the conscientiousness with which Perpetual and Messrs. Scrivener and Crowell have regarded their obligation to Sheridan. It should be a helpful guide to this court in gauging whether or not this unholy alliance of creditor and trustee should be ended for all time in the District of Columbia.

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15 Sinsell v. Davis, 24 App. D.C. 218.

16 "The partial assignor, however, is also a real party in interest because part of his substantive right was retained . . . . But since the requirement of joinder is solely for the protection of the debtor, it should be imposed only upon his insistence, and failure of the debtor to make a seasonable objection . . . should result in the waiver of it." 5 Moore's Federal Practice, 2d Edition, 1334-1345.

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Appellant,

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Appellees.

Second Appeal from the United States District Court
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Second Appeal from the United States District Court
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JOINT APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LEO G. SHERIDAN, Plaintiff v. PERPETUAL BUILDING ASSOCIATION, a body corporate, JUNIOR F. CROWELL, individually and as trustee, SAMUEL SCRIVENER, JR., individually and as trustee, Defendants	:	Civil Action No. 619-59

DOCKET ENTRIES

Date 1959	*Proceedings*
Mar. 3	Complaint, appearance
Mar. 3	Summons, copies (3) and copies (3) of Complaint issued all ser. 3-4-59
Apr. 27	Answer of deft. #1 to complt; c/m 4-27-59; Counter-claim; Appearance of Samuel Scrivener, Jr. filed.
Apr. 27	Answer of defts. #2 and #3 individually and as trustees; Counter-claim; c/mailing; Appearance of Samuel Scrivener, Jr. filed.
Apr. 29	Motion of defts. #2 and #3 to add as parties deft: Perpetual Building Association, Leo G. Sheridan, Kenneth S. DuMond, 1823-1825 Jefferson Place, N. W., Co., a Maryland Corporation, Helen B. Brent, Franklin T. Garrett, and U.S.A., represented by Internal Revenue Service; P and A; Notice; c/m 4-28-59; M.C. 4-29-59; filed.

1959 Docket Entries (Cont'd)

May	7	Reply of pltf. to defts'. motion to add parties; filed.
May	7	Answer of pltf. to counter-claim of deft. #1; c/m 5-6-59; filed.
May	7	Answer of pltf. to counter-claim of deft. #2; c/m 5-6-59; filed.
May	13	Order making following parties as parties deft.: Perpetual Bldg. Association, Leo G. Sheridan, Kenneth S. DuMond, 1823-1855 Jefferson Place, N. W. Company, Helen B. Brent, Franklin T. Garrett, and the U.S.A. (N) Holtzoff, J.
June	15	Summons, copies (7) & copies (7) of counter-claim for interpleader & order issued to defts. on counter-claim for inter-pleader. pltf. ser. 6-22-59. #6 ser. 7-7-59
June	29	Order adding Dana Latham, Director of Internal Revenue Service. (N) Holtzoff, J.
July	7	Summons, copies (2) and copies (2) of complaint issued to 11 & 8. 8 n.f. 7-8; 11 ser. 7-8
July	8	Summons, copy and copy of counter-claim for interpleader and copy of order issued vs. deft. #7. ser. 7-10-59
July	20	Answer of deft. #9 to counter-claim for interpleader; c/m 7-18-59; Appearance of Franklin T. Garrett pro se. filed.
Aug.	18	Motion of deft. #10 to dismiss; Appearance of Abbott M. Sellers, Fred B. Ugast, and Frank W. Rogers, Jr., and Oliver Gasch for deft. #10; c/m 8-18-59; P & A; M.C. 8-18-59; filed.
Aug.	25	Summons, copy, and copy of answer, and copy of counter-claim for interpleader issued vs deft. #8 ser. 8-27
Aug.	28	Motion of deft. #11 to dismiss; P & A; c/m 8-28-59; M.C. 8-28-59; Appearance of Charles Rice, Richard M. Roberts, Frank W. Rogers, and Oliver Gasch for deft. #11; filed.

1959 Docket Entries (Cont'd)

Oct.	2	Opposition of interpleading trustees to motion of deft. #10 to dismiss; c/s 10-2-59. filed.
Oct.	9	Order granting motion of Dana Latham, Commissioner of Internal Revenue Service, to dismiss counterclaim for interpleader as to deft. #11, and dismissing same. (N) Holtzoff, J.
Oct.	9	Order granting motion of U.S.A. to dismiss counterclaim for interpleader as to deft. #10 and dismissing same. (N) Holtzoff, J.
Dec.	9	Motion of pltf. to dismiss counter-claim for interpleader as to all parties not yet served with process, or in default; to calendar principal cause on ready calendar; P & A; c/m 12-8-59; M.C. 12-9-59. filed.

1960

Jan.	7	Consent order dismissing counterclaim for interpleader as to all parties not yet served with process or are in default, namely defts. #6, #7, #8 and ordering that cause be Calendared and placed on Ready Calendar. (N) Curran, J.
Jan.	7	Calendared (N) and Certified Ready (per above order).
Mar.	28	Pretrial Statement of defts. filed.
Mar.	29	Counter-claim for interpleader and answer to same filed by deft. #9 dismissed as to deft #9 only per counsel for pltf., defts. #1-5 incl., and deft. #9 pro se. (N/AC); filed.
May	9	Pretrial statement of pltf. filed.
May	9	Pretrial Proceedings Asst. Pretrial Examiner
Oct.	27	Hearing begun & finding for defts. (order to be presented) reported by G. Kaitz. Keech, J.
Nov.	3	Transcript of 10-28-60; pp. 1-3; (reported Harry Kaitz) (clerks copy) filed.
Nov.	16	Finds of Fact and Conclusions of Law. (N) Keech, J.

Docket Entries (Cont'd)

1960			
Nov.	16	Judgment that the trustees pay to pltf. the sum of $1,242.77, the surplus now held by them from sale of the subject property; each party pay their own costs; dismissing complaint in all other respects. (N)	Keech, J.
Nov.	29	Paragraph 1 of the judgment entered Nov. 16, 1960, "paid and satisfied" per atty for pltf.	filed.
Dec.	6	Notice of appeal of pltf; deposit by Bartow $5.00 (copy to Samuel Scrivener, Jr.)	filed.
Dec.	6	Cost bond on appeal of pltf. in amount of $250.00 with USF&G approved and	filed.
1961			
Jan.	13	Stipulation of counsel for pltf. & defts. re: Facts.	filed.
Jan.	13	Defendants Exhibits 1-11 inclusive.	filed.
Jan.	16	Record on appeal delivered to USCA; deposit by Norman H. Bartow, $1.55.	
Jan.	16	Receipt from USCA for original papers.	filed.
1962			
Mar.	6	Bill of costs as taxed by Clerk of USCA in amount of $195.95	filed.
Mar.	6	Certified copy of judgment of USCA reversing and remanding for further proceedings; appellant to recover costs; copy of opinion attached.	
Mar.	12	Return of record and exhibits to District Court files from Clerk, USCA	filed.
June	6	Costs on appeal paid and satisfied in full per plaintiffs attorney.	filed.
Sept.	24	Appearance of Thomas Jackson as atty. for defts.; c/m 9/21/62. Atty. Jackson (1025 Conn. Ave.) appeared for defts. #1, 2, 3, 4	filed.
Oct.	4	Hearing begun; respited until Oct. 5, 10 A.M.	Hart, J.
Oct.	8	Hearing resumed; respited until tomorrow at 10 A.M.	Hart, J.

		Docket Entries (Cont'd)
1962		
Oct.	9	Hearing resumed; finding for deft.; order to be presented. Hart, J.
Oct.	18	Transcript of proceedings of 10-9-62; pages 1-24. (Rep. Edna B. Romig, Court copy) filed.
Nov.	1	Transcript of proceedings of 10-4, 5, 8, 1962; pages 1-102. (Rep. G.G. Davis, Jr.) (Court's copy) filed.
Nov.	16	Findings of fact, conclusions of law & final judgment dismissing complaint; each party to bear own costs. (N) Hart, J.
Nov.	19	Proposed finding of fact, conclusions of law & judgment; memorandum of pltf's suggestions on findings of the Court; memorandum of deft's proposed findings of fact & deft's objection to the Court's receipt of purported factual material presented for the first time by pltf. filed.
Dec.	14	Notice of appeal of pltf; copy mailed to Thomas S. Jackson; deposit by Bartow, $5.00. filed.
Dec.	14	Cost bond on appeal of pltf. in amt. of $250.00 with USF & G Co. approved & (etd. 1-3-63) filed.
1963		
Jan.	2	Motion of defts to strike notice of appeal or to require bond; c/m 1-2-63; P & A; MC 1-2-63. filed.
Jan.	4	Opposition of pltf. to motion to strike notice of appeal; c/m 1-3-63. filed.
Jan.	15	Designation of contents of record on appeal; c/m 1-15-63. filed.
Jan.	17	Order denying deft's motion to strike the notice of appeal or to require pltf. to file cost bond. (N) (signed 1-16-63) Hart, J.
Jan.	21	Exhibits Nos. 1 thru 12 of pltf. filed.
Jan.	22	Exhibits Nos. 12, 13, 13a, 14, 15, 16a, 16b, 17a, 17b, 17c, 18 thru 24, 26, 27. filed.

1963 Docket Entries (Cont'd)

Jan. 22 Transcripts of proceedings 10-5-62, pages 1-53 & 10-8-62, page 22. (Rep. George C. Davis, Jr.) (Clerk's copy) filed.

Jan. 22 Transcript of proceedings 10-9-62, pages 1-24. (Rep. Edna B. Romig) (clerk's copy) filed.

Jan. 22 Transcripts of proceedings 10-8-62, pages 22; 10-5-62, pages 1-53; 10-4-62, 10-5-62, 10-8-62, pages 102. (Rep. George C. Davis, Jr.) (Att's copy) filed.

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

Washington, D.C.
October 4, 1962

1 The above-entitled cause came on for hearing before the HONORABLE GEORGE L. HART, JR., United States District Judge, at 10:00 o'clock a.m.

* * * * *

3 JULES FINK

called as a witness on behalf of the Defendant and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. JACKSON

* * * * *

8 Q. * * * Now, Mr. Fink, did you have any conversation with the auctioneer or did your client have any conversation with the auctioneer

9 with respect to the federal tax lien? A. There was conversation with respect to the federal tax lien. I can't say for certain that it was with the auctioneer. That is my impression at this moment.

Q. Do you have a recollection of having conversation with Mr. Thomas? A. Yes, sir.

Q. And what was that conversation concerning? A. Concerning the tax lien.

Q. Yes, sir. A. And the fact that there should be no problem in releasing that lien.

* * * * *

10 Q. Will you tell us how, so far as you personally know, how it comes that he did not purchase the property? A. Yes, sir. He placed a $500 deposit on the property and thereafter I sought to have the tax lien released, partially released; that is, insofar as getting clear title to the property was concerned under the appropriate provisions of the Internal Revenue Code.

Q. What did you do in an effort to procure release of this property? A. I went to Baltimore — Well, first I submitted a complete type of small brochure setting forth the position of my client with respect to the reasons why the lien should be released. In order to do that, I had the property appraised to show the Internal Revenue Service that the amount which my client paid for it was inequal to or in excess of its real value and that, therefore, their lien was, in effect, valueless,

11 and this is provided for under the Internal Revenue Code provisions.

I then went to Baltimore, had numerous conferences with both Mr. Solomon in the Baltimore office, who is the Chief of the Lien Division of Internal Revenue, and Mr. Leonardo here in the District tax office, who, I believe, was a revenue agent involved with respect to this property; and there were a couple of pieces of correspondence with the Internal Revenue Service involving this matter; and ultimately I received a notice that my application for release of the lien was rejected.

Q. And was it because it was rejected that you — that your client declined to purchase the property? A. That's correct.

* * * * * *

14 Q. Will you state to the Court whether, had your client been sued, rather than a forfeiture of the deposit, you, on behalf of your client, would have resisted that suit? A. I would have had to resist it.

Q. Well, would you have? A. Yes, sir.

Q. And did you, in good faith, believe that your client had a proper

15 defense to that action?

i

* * * * * *

Q. * * * Will you state the reasons why you felt that your client was not responsible to take the property at the amount bid at the foreclosure sale? A. Well, there were several reasons that were involved.

16 Number one, the understanding we had was that the lien, federal tax lien, was to be released and that there would be no problem about the release. We acted upon that assumption in making the bid, to begin with. The bid was made reluctantly by my client at the last moment, almost seconds before the bidding was closed, simply because he understood the lien was to be released.

Secondly, we felt ---

THE COURT: Wait a minute. Whom did you understand that from?

THE WITNESS: From the discussions at the foreclosure sale. We had had -- I had talked to Mr. Thomas about it. There was just a general discussion and I can't tell you who was doing the discussing at the auctioneer's stand, that the lien, itself, or that there would be no problem about releasing it. It was not in the advertised notice of sale, and we felt strongly that to enforce this contract against us would have been a breach of our understanding of what our rights were with respect to the release of the lien.

* * * * * *

17 Q. [By Mr. Jackson] Now, in respect to this, did you regard the forfeiture of the deposit as the compromise of a disputed claim? A. I certainly did.

Q. Mr. Fink, at that time were you aware of the confusion in the law with respect to the enforcement of a federal tax lien against property foreclosed under a prior recorded mortgage? A. I was definitely

18 aware of it and discussed it very thoroughly with the Internal Revenue Agents and had researched the law and argued with them about the applicability of the law and that the split of the Circuit Courts of Appeal on the subject.

Q. And in the course of your efforts to persuade the Bureau to grant a release on this property, did they recognize that there was a confusion in the law that it had not yet been definitely determined? A. They did so recognize.

Q. But do you know, as a matter of fact, that it has afterwards been determined by the Supreme Court? A. I know that to be a fact.

Q. Do you know what case? A. I don't remember the case but I remember reading it with much glee because it supports my viewpoint of the subject matter.

Q. * * * With respect to this lien, the lien that your client held against this property, was it a lien in his own name or did he hold it in some capacity in fiduciary capacity? A He held it in a fiduciary capacity for his children, * * *

19 Q. Were you aware of the instruments or what the nature of the instruments, which were secured by lien against the property, were they notes? A. There were notes, yes, sir.

* * * * * *

Q. Do you happen to remember that there were two notes, one payable to one; one payable on the other? A. Yes, there were.

Q. What amounts? A. $5500 each, I believe. Total was $11,000.

22 * * * * * *

Q. Well, except as a transient, or passing through in the District of Columbia, he was not available to service of process in the District, was he? A. That's correct; he was not.

* * * * * *

23 THE COURT: Where was he stationed?

THE WITNESS: Blue Ridge Summit, Pennsylvania. I might say, Your Honor, and I don't know any more about it than what I am telling the Court, this is a secret installation somewhere in Pennsylvania, in which he was stationed.

* * * * * *

CROSS EXAMINATION BY MR. DOWDEY:

Q. Well, do you recall the names of anybody else that was at the sale other than Mr. Thomas? A. Yes, I believe Mr. Sheridan was there. Seeing him here today refreshed my recollection that he was there and I remember talking with him because we were there early, as I recollect, and Colonel Dumond and myself, and I think Mr. Sheridan went through the property. Somebody was there with a key and we went through the property, examined it at that time, looked at the condition of it.

Q. Did you see anybody else here today that was there? A. I can't say that I am sure that I see anybody else that was there.

Q. Do you know Mr. Crowell? A. I know who he is.

Q. Was he there? A. I can't tell you that truthfully. I don't recall. I remember Mr. Thomas being there.

Q. Mr. Scrivener, do you know him? A. I know him, yes, sir.

Q. Do you remember him being there? A. I can't say that I do.

Q. I notice you have used your file quite frequently here. May I look at it? A. You may look at it. I don't have anything to hide except that there are certain things in here which are confidential communications with Colonel Dumond which I would feel -- would ask the Court its ruling with respect to promiscuous examination.

THE COURT: Well, you certainly don't have to show him any confidential communications. The simplest way to handle this, I think, might be if we take our recess at this time and you show him what you think you can and don't show him what you think you can't.

(Following a 53-minute recess the following proceedings were had:)

MR. DOWDEY: Your Honor, I haven't completed examination of the file. It took us some time to extract from it certain confidential communications that Mr. Fink wanted to preserve.

THE COURT: Well, you have had almost an hour and I can't continue to waste trial time this way. You may look at it this evening sometime or any other time and if you want to call Mr. Fink back, you can do it if he is not still on the stand but let's get ahead with the case.

* * * * * *

Q. Now, I believe we have covered all communications between you and Mr. Thomas or anybody at Perpetual prior to February 18, 1958? A. Yes, sir.

Q. And all communications of any kind as with Mr. Scrivener and Mr. Crowell? A. Yes, sir.

Q. Now, subsequent to February 18, 1958, did you have any communication of any kind with Mr. Thomas other than Exhibits 7 and 8 -- 6, 7, and 8? A. Telephone call March 10th referring to a conversation

with Mr. Thomas, case to be sent to committee of Perpetual on the 17th re foreclosure or court suit to release lien. The key was mailed on 1743 18th Street. The letter -- there is a letter of March -- excuse me, strike that.

There is a telephone communication with Mr. Thomas at Perpetual on April the 2nd, re the return of a deposit if someone takes over our interest and there is nothing else in this file subsequent to the dates you spoke of except that which has already been admitted into evidence.

13 Q. There's just those; is that correct? A. Yes, sir.

Q. And that is -- first one appears to be March 10, 1958 which was right after your letter to Mr. Thomas, Defendant's Exhibit 8, dated March 5, in which you told him that you considered that deposit had been forfeited. A. On instructions from Colonel Dumond, yes, sir.

Q. All right, and your notation, I take it, is what Mr. Thomas told you in reply to that letter; is that correct?

MR. JACKSON: Reply to which letter?

BY MR. DOWDEY:

Q. In reply to the letter I just mentioned, Defendant's Exhibit 8, a letter of Mr. Fink to Mr. Thomas, letter of March 5, 1958. A. That is my notation of the conversation that I had with him with regard to this.

Q. And that would indicate that he told you the case was to be sent to the committee at Perpetual on the 17th re foreclosure or court suit to relieve lien; is that correct? A. That is what the notation indicates.

Q. Is that what Mr. Thomas told you? A. I can only tell you that I wrote down what I believed our conversation was and that is a record of it.

* * * * * *

16 REDIRECT EXAMINATION BY MR. JACKSON

Q. Did you procure some appraisals of these properties?

A. Yes, sir.

Q. Would you tell me who the appraisers were of this property?

A. Yes, sir, Mr. William M. Dora and Mr. Edward Ehrlich.

Q. And what appraisals, what figures did they give you? A. One was, I believe eleven-five and the other was twelve thousand.

* * * * * *

17 Q. Having those appraisals in your hands and if your client was responsible for relieving, for paying the federal tax lien of forty-some hundred dollars, would you have recommended his bidding $12,000 for the property; if you can answer that question? A. I honestly can't answer it as to what I would have recommended to him. I know what I did do at the time.

Q. What was it that you did do? A. Well, at the time that the entire matter came up he was seeking to recoup an $11,000 investment that he already had in this property by these two notes and he felt that -- and I felt that if there was some way he could do it, he ought to try.

18 The property in a fixed-up condition might very well bring as much as he would pay for it, $12,050, plus the $11,000 he had into it, in a completed condition.

* * * * * *

[Proceedings of October 5, 1962, before Hon. G. L. Hart, J.]

29 ERNEST A. THOMAS

DIRECT EXAMINATION BY MR. JACKSON

* * * * * *

31 Q. Were payments regularly made after that? A. No, sir; from the inception of the loan, the account has been delinquent.

* * * * * *

33 Q. Now, after 1955 did there come a time when the property was foreclosed? A. Yes, sir.

Q. Between the time of the transfer to Schnitzer and the time of the foreclosure -- and we know there were two foreclosures and I refer to the first one in January of 1958 -- between the date of the conveyance in '55 and 1958, will you tell the Court what the record shows with respect to defaults, notices and deficiencies and compliance with notices of deficiencies? A. Well, from the period 17 -- a year and a half, rather, from the inception of the loan, January of '53 to July of '54, a total of 17 notices were sent, and after the loan is assumed on December 15, 1955, which covers -- and to the time of December 2nd, 1957, which

34 -- there was a total of 15 notices sent included in which were copies of the advertisement of foreclosure on -- six times over a period of one year and ten months.

Q. There came a time when you determined that it was necessary

to notify the trustees to foreclose it, I take it? A. Yes, sir.

Q. When was that? A. On the --

Q. When was the first time you notified the trustees to foreclose, if you have a record of it? A. On Executive Meeting at the office on December 12, 1957, foreclosure was then authorized.

Q. Is that the first time that there had been a notice to the borrower? A. No.

Q. Or the owner? A. No, sir.

Q. That the property was going to be foreclosed? A. No, sir.

Q. When -- A. First time was April 18, 1957.

Q. After the notice in April of 1957, of an intent to foreclose, what occurred with respect to payments on the account bringing the
35 account into balance? A. On April 24, '57, a $500 payment was made.

Q. Did that bring it up to date? A. No, sir, it paid up to January 1957.

Q. Thereafter was there a -- prior to the determination to foreclose were there notices sent of default? A. Yes, sir, following the April payment.

Q. How many, and to whom were these notices sent? A. On May 1957, we sent a notice asking for four payments, notice went to Leo G. Sheridan, Shirley Schnitzer, care of Lloyd Hollander, Franklin T. Garrett, Col. Dumond. That's it.

Q. Now, after the determination by the Executive Committee in December 1957, that the property should be foreclosed, did a notice of intent to foreclose, and of sale, go to any of the parties you have indicated? A. The same parties, yes, sir.

Q. Do you have copies with you of the notices that were sent? A. Yes, sir.

Q. And do you have any record of the mailing with you? A. Return registered receipt, return notice from the Post Office from all those parties.

Q. Will you produce them, please? Is there one here to Leo G.--

36 to Sheridan? These are registered mail -- A. Receipts from the Post Office.

Q. Receipts. And this one is signed "Mrs. A. Sheridan" is that correct? A. Yes, sir.

Q. And to what address was it sent? A. 5511 Broad Branch Road, Northwest.

Q. And notice of the intent to foreclose, to sell at auction under foreclosure, it was sent to who else at that time? A. Col. Kenneth Dumond in Pennsylvania; Franklin Garrett, Bethesda, Maryland; Mrs. Shirley Schnitzer, 1925 Jefferson Street, Northwest.

Q. Is that one that was returned unclaimed? A. Unclaimed, yes, sir.

Q. The one to Col. Dumond was not returned unclaimed, was it? A. No, sir.

Q. Do you have a return receipt? A. Yes, sir.

Q. Signed "K. S. Dumond"? A. Yes, sir.

* * * * * * *

38 (Defendants' Exhibit No. 15 was marked for identification and admitted in evidence.)

BY MR. JACKSON:

Q. Pursuant to this notice, was the property actually sold at that foreclosure?

THE COURT: Let me see that just a moment before you proceed, Mr. Jackson, so that we can get in the record just what Exhibit 15 is.

MR. JACKSON: Yes, sir.

THE COURT: Exhibit 15 is a form of notice by Thomas J. Owen & Son of an auction to take place on the 3rd of January, 1958, and I take it it is the same as that which was published in the paper, is that correct?

MR. JACKSON: Yes, sir.

THE COURT: And an envelope addressed to Shirley Schnitzer by

Perpetual, which shows it was returned to the writer, and there are three registered receipts showing mailings to Mrs. Shirley Schnitzer, Mr. Leo G. Sheridan, Mr. Franklin T. Gannett, is it?

39 THE WITNESS: Garrett.

MR. JACKSON: Garrett.

THE COURT: And Lt. Col. Kenneth Dumond; and there are return receipts, registered mail, signed by Col. Dumond, one addressed to Mr. Sheridan signed by Mrs. A. Sheridan. Then receipt, one of these return receipts which is unsigned has the same registry number as that one sent to Mr. Leo Sheridan.

BY MR. JACKSON:

Q. Do you have any knowledge, Mr. Thomas, of why there would have been an unsigned return receipt bearing the same number? A. I don't know, Mr. Jackson. Maybe if I look at it I can determine.

(The document was handed to the witness.)

I notice, Your Honor, the one signed by Mr. Sheridan doesn't have any post office number.

THE COURT: Yes, I noticed that, too, and possibly the post office substituted one.

THE WITNESS: I think that is what it is because the date of delivery is the following day from the day we sent it out.

THE COURT: All right. Go ahead, Mr. Jackson.

40 BY MR. JACKSON:

Q. Now, prior to this foreclosure sale were you informed that the property had been damaged by fire? A. Yes, sir.

Q. As a result of that --

THE COURT: We are still talking about the foreclosure of January 3rd?

MR. JACKSON: Yes, sir.

BY MR. JACKSON:

Q. As a result of that, was there some insurance money coming into the hands of the Building Association? A. Yes, sir.

Q. Will you tell us what amount and in what form? A. In the amount of $9,713.41 on April 5, 1957.

Q. From where? A. From the insurance company.

Q. What insurance company? A. My records don't show, but I am positive it is the Firemans Insurance Company.

Q. Do you know whether Perpetual Building Association held a policy of fire insurance on the property at that time? A. Yes, sir, we did.

Q. And how was the insured in that policy described? A. As Leo G. Sheridan.

41 Q. Was the Perpetual Building Association -- does the interest of the Perpetual Building Association in the property show? A. Yes, as interest may appear as first trust holders.

Q. You have a copy of what? Do you have a copy of the policy? A. No, sir, I have a copy only of the account which was opened upon the receipt of the insurance check.

Q. Where would the insurance policy be? A. I assume, Mr. Jackson, the insurance policy went back to the company upon payment of the check. Nothing is in my file on it now.

Q. Well, it would have been surrendered at the time of the sale of the property, wouldn't it? A. That's correct.

Q. And for procurement of return premium? A. That's correct.

Q. Now, after you received these proceeds, was an account opened? A. Yes, sir, it was.

Q. Was that pursuant to some arrangement with Mr. Sheridan? A. That is the usual procedure in cases where the property is damaged by fire that we hold the check in the account until the property is fixed

42 up.

* * * * * * *

54 Q. Incidentally, in connection with the fire loss and release of the proceeds, did your company have occasion to send Inspectors to

determine the progress on restoration? A. Yes, we did.

55 Q. And before any of these funds were released, did you have an inspection report? A. Yes, sir, we did.

Q. And at the time of the first foreclosure, what was the balance remaining in that fund? A. $4,544.71.

Q. Was that treated as an ordinary deposit with the company? That is to say, was it a deposit which bears interest? A. That's correct, sir.

Q. And was interest posted to this account during the time that the Perpetual Building Association held these funds? A. That's correct, yes, sir.

Q. And the balance you have indicated reflects the accumulation of interest? A. Of dividends, yes, sir.

Q. At the foreclosure sale in January of 1957, did you make a bid on behalf -- A. January '58.

Q. -- of Perpetual Building Association? A. January '58, yes, sir.

Q. Is that unusual? I mean, do you -- A. No, that is the usual procedure.

56 Q. And what was the amount of your bid? A. $12,000.

Q. What was the amount of the balance on your loan at -- due on your loan at the time? A. We showed a balance including the advertising and auctioneer's fee and real estate taxes estimated at a balance of $12,005.97.

Q. Were there any other bids? A. There was one additional bid. My original bid was $12,000 and there was an additional bill of $50, a total of $12,050.

Q. By whom? A. By --

Q. If you remember. A. It was either Col. Dumond or his attorney.

Q. A buyer on behalf of Col. Dumond? A. Yes, sir.

Q. Now, did you attend the second foreclosure sale? A. Yes, sir.

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60 Q. Afterwards did you instruct the trustee to sell the property again? A. Yes, sir, we did.

Q. Were you present at the second sale? A. Yes, sir.

Q. Do you recall who was present at that sale? A. Yes, we made notations at that time. The trustee -- I mean, -- yes, the trustee, Mr. Scrivener and Mr. Crowell, Mr. Scott Athey, Mr. Roger Washburn, Mr. John Gant, Mr. Norman Bartow, and Mr. Leo Nardo from the Internal Revenue Office.

Q. Did the auctioneer at that time indicate that a -- what kind of title was he selling? A. Good title -- guaranteed title or no sale.

Q. Now, how did it come about that he didn't, at that sale, indicate that the purchase was subject to federal tax lien, if you know? A. At the meeting of the Executive Board, just prior to the sale and after the result of the first sale having been well attended and, yet, no bids made, it was their conclusion that the property should be sold and no mention of the tax deed -- tax lien be reported. We felt that it

61 would probably restrict the sale and the property was deteriorating because it was sitting there idle and we felt it would be better to sell the property at the highest bid at that time and assume a responsibility, if any, either to litigate it or satisfy ourselves, satisfy it ourselves.

Q. And did you know that the Title Company was afterwards indemnified against any loss by giving a good title free and clear of the tax lien? A. You mean indemnified in which way?

Q. Did you -- well, strike that. In any event, the property was not sold by the auctioneer subject to a tax lien? A. That's correct.

Q. Now, did you bid? A. I made the first bid, yes, sir.

Q. What was the bid? A. $9,500.

Q. Was there any other bid? A. One additional bid of $50, again.

Q. By whom? A. By -- it was made by Mr. Gant, John T. Gant, in behalf of either his client or his straw, Helen B. Brent.

Q. And did you have to do anything to stimulate a bid? A. There was, again, no interest shown among the people I mentioned there.

62 There were, I'd say, a half a dozen more whose names I didn't have, but no one seemed to be interested in taking it over in its present condition at that time. Mr. Gant said, "If you will take back a loan, I might be able to take it over and do something with it," so we agreed at that time if he would put in $550 in cash we were to take a first trust back in the amount of $9,000, a purchase money trust. We felt, again, that it would be better to have it someone else's hands that would fix the property up and therefore help the situation all around.

Q. Afterwards, was the property closed at the Title Company at that price? A. Yes, sir, it was.

Q. Did anybody ever come around and ask, as far as you were concerned, for any opportunity to purchase the property? A. No, sir.

Q. Other than these bids at the foreclosure sales? A. No, sir.

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65 CROSS EXAMINATION BY MR. DOWDEY

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68 Q. Well, could you tell us what your customary practice is, then? A. After the account becomes delinquent it is then submitted to the executive committee for action and after they have authorized foreclosure, the account, the -- I at that time ask the trustees on behalf of the note holders to proceed with the foreclosure.

Q. You ask them personally? A. That's right.

Q. Do you go to their office to ask them? A. I have called Mr. Scrivener on many occasions as I have called Mr. Crowell on many occasions.

Q. Now, the Executive Committee, just prior to this 1958 foreclosure --

THE COURT: Which one? There are two of them.

MR. DOWDEY: I am sorry. I didn't hear Your Honor.

THE COURT: I say, which 1958 foreclosure? There are two of them.

BY MR. DOWDEY:

Q. I am sorry; just prior to this January 3rd, 1958 foreclosure, consisted of whom? A. Pardon me? I didn't understand that.

Q. Who were the members of the Executive Committee of which you speak? A. Mr. Edward C. Baltz, as president, Mr. Thornton Owen, Mr. William King, Mr. Samuel Scrivener, Sr., Mr. Samuel Scri-
69 vener, Jr., and Mr. Dyer, William H. Dyer.

Q. So, after you have this meeting and that Executive Committee determines that there shall be a foreclosure -- is that correct sir? A. That's right.

Q. Then you go and tell Mr. Scrivener to foreclose? A. We asked the trustees to have the advertisement prepared for their signature, we had prepared for their signature, and at that time turn it over to the auctioneer for foreclosure, by the trustee.

Q. Did I misunderstand you just previously when you said that you went personally to Mr. Scrivener and told him to foreclose? A. No, we talked to Mr. Scrivener. Mr. Scrivener is in the office practically two or three times a week.

Q. Well, he is a member of this Committee, isn't he? A. That's correct.

Q. Well, you don't have to tell him what the Committee does, do you? A. I didn't tell him what the Committee does. When the Committee advises me to proceed with the foreclosure, I at that time ask the trustees to have the ad prepared for their signature to turn over to the auctioneer for foreclosing.

70 Q. And without your telling them they don't know to do this, is that right? A. Mr. Crowell would not, no.

Q. Mr. Scrivener wouldn't tell him? A. He probably has conversations with him, too.

Q. Now, this first sale was postponed once, wasn't it? A. My recollection, it was.

Q. Well, now, in the event of a postponement, who determines that? A. Well, it could be for various reasons.

THE COURT: He said who determines it.

THE WITNESS: Most cases, Mr. Baltz, the president.

BY MR. DOWDEY:

Q. Mr. Baltz? A. Yes.

Q. Do you know who determined it in this case? A. No, I don't.

Q. Do you know that there was a postponement? A. My recollection, there was, yes.

Q. Do you have any record of it? A. No, I don't.

Q. Do you have any recollection of the conversation with Mr. Fink about a postponement? A. There was a conversation on the telephone with Mr. Fink, which he was trying to work out the best

71 proposition for his client and I think we did hold the sale up, as to how long a delay, I do not remember.

Q. You say we did. Who decided to hold it up? A. One, his request, I assume that I -- as I usually do, if it is a case of a loan as bad as this one, we would -- I would naturally take it up with Mr. Baltz.

Q. And did you take it up with Mr. Baltz? A. I assume I did.

Q. But you have no present recollection? A. I have no record.

Q. Of taking it up with him? A. No.

Q. Did you take it up with the trustees? A. No, because at that point we had not proceeded with the foreclosure. It is entirely a matter of the noteholder.

THE COURT: Is this --

MR. DOWDEY: I misunderstood you.

THE COURT: Wait just a minute. I am a little confused here. Was this sale postponed after the advertisement for the sale?

THE WITNESS: No, Your Honor.

THE COURT: Or before the advertisement for the sale?

72 THE WITNESS: It was postponed prior to the advertisement of the original sale, of the January 3rd sale.

THE COURT: All right.

THE WITNESS: In other words, we may have prepared the sale

and sent Col. Dumond notice of foreclosure and, as I recall, Mr. Fink called me and asked me that he was trying to work out a best deal possible for his client. At this time, of course, we knew that the owner of the property, Mr. Hollander, was in jail and he was trying to contact all parties concerned, see if his client could work out of this deal. I don't remember how long a period it was that we --

THE COURT: But the postponement was not after advertisement?

THE WITNESS: No, sir.

THE COURT: All right.

BY MR. DOWDEY:

Q. I am not sure I understand you, Mr. Thomas. There was a notice that you were going to foreclose but that notice had not been advertised, is that correct? Is that what you are saying? A. No, this was sent with our intent to foreclose.

Q. Do you happen to have a copy of that?

THE COURT: Isn't that one of the exhibits here?

MR. JACKSON: Yes, I was wondering why Mr. Dowdey wouldn't

73 show Mr. Thomas and see if he has in his files, refresh his recollection, the exhibit, Plaintiff's Exhibit No. 10.

MR. DOWDEY: Just a moment.

THE COURT: Let me see Plaintiff's 10.

(Plaintiff's Exhibit 10 was handed to the Court by the Deputy Clerk.)

MR. DOWDEY: Oh, yes, I will -- that isn't what I am concerned about at this moment, Your Honor.

THE COURT: Let me see those exhibits. Which has the attached return receipt card on it? Well, according to Plaintiff's Exhibit 10, your agreement with Mr. Fink took place in a telephone conversation on December 9th and that was to foreclose prior to Thursday, December 19th; is that correct?

THE WITNESS: It could have been. I don't recall the

conversation at all, Your Honor, except that I remember talking to him and, as the time element, I wouldn't know.

THE COURT: Look at your letter of December 11, 1957, from Mr. Fink.

MR. JACKSON: It was the other way, from Mr. Fink.

THE COURT: From Mr. Fink; I said from Mr. Fink to you, from Mr. Fink, December 11, 1957.

MR. JACKSON: I am sorry.

74 THE COURT: Here, to save time, look at this one.

THE WITNESS: Yes, sir.

THE COURT: And then it was after that on December the 13th when you mailed the notices to the various people as indicated in Defendants' Exhibit 15, stating that the sale would be on the 30th, is that correct? I mean, on the 3rd of January.

THE WITNESS: That's correct, yes, sir.

THE COURT: All right.

BY MR. DOWDEY:

Q. Now, if that will help you, Mr. Thomas, what I am asking you is, what action was taken prior to that notice of -- A. Prior to this letter?

Q. No, prior to -- well, prior to that letter, yes. Let me have the two that the Court just referred to. A. I don't follow you. What do you mean, what action was taken?

Q. Well, had the Committee taken up this matter and had a foreclosure been determined upon? A. Of the --

Q. Prior to December 9? A. The Executive Committee states that the property should be put up for foreclosure. The determination of the date and time is left for me to work out with the trustees when

75 they are available.

THE COURT: What was the date of the Executive Committee decision?

THE WITNESS: December the -- let me see -- June the 19th,

1958, foreclosure was authorized.

BY MR. DOWDEY:

Q. Did I understand you correctly, June what? A. No, that is the second one. The first was, I guess, the 12th -- no, it is '57, December the 12th, authorization was granted.

Q. Was there any prior meeting to December 12th of the Executive Committee? A. Prior to that date?

Q. Concerning foreclosure, authorization of foreclosure? A. August 1st, 1957 was authorized for foreclosure.

Q. And that was the Executive Committee, August 1, 1957, authorized foreclosure? A. No, sir, August -- August 1, that's correct.

THE COURT: Is that when somebody came in and paid $500?

THE WITNESS: I think it is after that, Your Honor. I think it was $613.75 on August 19, '57; it was paid.

76 Q. And who came in? A. I assume it would be Mr. Hollander.

Q. Mr. Thomas, did you ever give Mr. Fink any advice about whether these tax liens or, tax lien on this property that we are talking about, could be easily avoided? A. I don't recall that I did, but there were several people attending the first sale that told Mr. Fink and his client that they didn't think that he'd have too much to worry about because there had been many tax liens released for fifty to a hundred dollars, that they certainly felt that the property wasn't worth what was owed on it and he certainly ought to be able to get it released.

Q. The auctioneer didn't tell him that, did he? A. No, sir.

Q. And you didn't, or did you? A. I did not.

Q. You did not? A. No, sir.

Q. The trustee didn't tell him, did he? A. No, sir, not to my knowledge.

Q. Now, after that sale, when was the next time that you had occasion to consult with Mr. Scrivener, Jr., or Mr. Crowell? A. After the first sale?

77 Q. Yes. A. I assume it was after we had the letter from Mr. Fink advising us that his client was going to -- not -- proceed with settlement of the sale on February 18. I discussed it with the trustees. We sat down and with the -- Mr. Baltz, and it was at that time decided that the best advantage would be to allow this purchaser to forfeit his deposit and proceed with another sale.

Q. And that was in a discussion with Mr. Baltz and who else? A. The two trustees.

Q. Mr. Crowell and Mr. Scrivener were there? A. Yes.

Q. When and where did that discussion take place? A. I assume it took place in our office.

Q. Well, now, do you know that this took place, or are you assuming it took place? A. Well, at -- as a result of this meeting the facts were given to me to proceed with the foreclosure then.

Q. Well, do you recall the meeting specifically, or do you assume that it was had? A. I assume it was had.

Q. You have no specific recollection apart from your assumption, then, is that correct? A. Well, I did sit in at one meeting at

78 which it was discussed, but at this particular time I don't recall.

Q. Was it discussed with the Executive Committee? A. No, sir.

Q. Was there a meeting of the Executive Committee at any time after this sale? A. Yes, and on June the 19th they authorized the foreclosure, authorized me foreclosure.

Q. And that happens to be the same day you seized the balance in Mr. Sheridan's account, isn't it? A. I think that's correct, yes, sir.

Q. Did they authorize both things at the same time? A. I wouldn't know that, sir.

Q. Well, you were authorized to seize his account, weren't you? A. It was after the Executive Committee meeting that they told me to apply the entire balance of the fire insurance loss to the account, yes.

Q. Who are "they"? A. The Executive Committee.

Q. It was after their meeting that they told you, you didn't attend the meeting? A. No, sir, I am not a member.

Q. Did you present the facts to them? A. No, sir, they knew
79 the facts. I mean, the facts had been presented. This isn't something which comes up every -- this has been -- we talked about this thing among the officers and the trustees for some time in relation to this insurance fund.

Q. Well, when did those discussions start about the insurance fund? A. I imagine prior to the second sale.

Q. And the officers and the trustees had discussed it on numerous occasions? A. I don't think the trustees may have had any interest in this fund.

Q. Well, I am not asking you that. I am asking you about who discussed it. A. It was inter-office discussion with the president, Mr. Baltz.

Q. Was the discussion with Mr. Baltz, or anybody else, anybody else discuss this? A. I don't recall now, no.

Q. Well, do you recall any of these specific discussions?
A. Yes, I do.

Q. Well, tell me which ones you specifically recall. A. I recall that after the meeting of the Executive Board on June the 19th, I think,
80 when authorization was requested -- authorization was given to re foreclose at that time, they told me that on the second sale they had decided to wipe out the insurance fund about reducing the loan balance by the amount of the insurance.

Q. And at that time the Executive Committee included Mr. Scrivener, did it not, Mr. Scrivener, Jr.? A. I would assume he would have been present.

Q. One of the trustees. Now, Mr. Thomas, you testified about various disbursements to Mr. Sheridan from the joint account he had with Perpetual. A. Yes, sir.

Q. And you mentioned only one instance, as I understand it, or was it two, where you had something from Mr. Gorlitz concerning a disbursement that you made? A. We have a telegram from Mr. Gorlitz authorizing one payment and the second that we had a check drawn to Leo Sheridan which was endorsed by Mr. Gorlitz.

Q. And how many disbursements were made to Mr. Sheridan? A. All told, seven.

Q. So, you have something from Mr. Gorlitz only with respect to two, is that right? A. That's correct.

81 Q. Now, what do you have for Mr. Bartow with respect to disbursements to Mr. Sheridan, how many disbursements? Do you have something from Mr. Bartow -- A. Appears to be only one.

Q. Did you give any notice to Mr. Sheridan of the seizure of this fund July 19, 1958? A. I don't recall that we did.

Q. Now, directing your attention to the postponement -- strike that. Directing your attention to the first sale, did you advise Mr. Sheridan or his representative, in any way other than simply issuing the formal notice? A. At the sale?

Q. Prior to the sale. A. No.

Q. You didn't discuss anything about the sale? A. No, I don't --

Q. Or the terms, or anything? A. As a matter of fact, I don't think Mr. Sheridan even presented himself in the office.

Q. I am sorry, I didn't hear you. You are holding your hand over your mouth. A. I don't think Mr. Sheridan even presented himself in the office with respect to the sale.

82 Q. Your answer is that prior to your first sale you didn't discuss anything about it with him? A. No.

Q. Now, subsequent to the first sale, did you have any discussions with Mr. Sheridan about anything? A. I think, if I recall, that he came in to inquire as to what would happen to the insurance fund in the event of a foreclosure. At that time, of course, I couldn't answer what they were going to do with it.

Q. But other than that you had no conversations with him?

A. Not that I recall.

Q. You didn't notify him in any way of what you were considering? A. Foreclosure?

Q. After the -- I am talking about after the first sale. Did you tell Mr. Sheridan anything? A. I don't recall if we did.

Q. Did you talk to him? A. We notified him of the second sale.

Q. And the notification of the second sale was merely the routine form, is that right? A. That's correct.

Q. And you didn't consult or advise him about any of these ne-
83 gotiations or discussions between the first and the second sale, is that correct? A. Not that I recall, other than -- I say, we discussed this insurance fund and then he wanted to know what his position would be on the balances and I told him at that time that we hadn't decided what we were going to do on it, and, secondly, since he was still the maker of the trust, he would be liable for any loss under the notes, deficiency.

(There was a short pause.)

Q. Mr. Thomas, a little while back you mentioned that although your record didn't show that you knew the fire insurance covering this property was with Firemans Insurance Company, is that correct -- A. That's correct, I have since found a memorandum that it was the Firemans Insurance Company.

Q. May I see that memorandum?

(There was a short pause.)

Never mind that for the moment, Mr. Thomas. We will go over that during the recess. A. It is the lower half of a check which they must have issued to us. (There was a short pause.)

THE COURT: Well, can't we go on? There doesn't seem to be much question that was the insurance company. Does counsel for plain-
84 tiff have any doubt that that is true? Go ahead.

MR. DOWDEY: No, but there is something more to it.

THE COURT: Well, go ahead and ask your next question.

BY MR. DOWDEY:

Q. How is that insurance placed by Perpetual?

MR. JACKSON: What difference is it? Just a minute. I don't know, I haven't objected --

THE COURT: I assume he is trying to get ready to show that some way or other there is a very close connection between this fire insurance company and the Perpetual joint ownership, or something or other. Is that what you are getting at?

MR. DOWDEY: Yes, Your Honor.

MR. JACKSON: So, what we would be willing to concede it, so what difference does that make to the case?

THE COURT: I don't know that it makes any, but what is the connection between the two?

THE WITNESS: Between the Firemans Insurance Company and Perpetual, there is absolutely no connection.

THE COURT: No stock owned, no common directors, no common officers?

THE WITNESS: Mr. Baltz is a director of the Fireman's In-

85 surance Company, but we will accept any outside policy anyone furnishes us.

THE COURT: That is not the question. Mr. Baltz is president of both Perpetual and of the Fireman's Insurance, is that correct?

THE WITNESS: Yes, sir -- no, he is not president. He is director. I don't know what his officership is there.

THE COURT: Any other common directors?

THE WITNESS: No, sir.

THE COURT: Any common officers?

THE WITNESS: No, sir.

THE COURT: Is it a stock company?

THE WITNESS: Yes, sir.

THE COURT: Who owns the stock? Does Perpetual own any of it?

THE WITNESS: No, sir.

THE COURT: Does Mr. Baltz own any of it?

THE WITNESS: I assume he does, I don't know.

THE COURT: Most of it?

THE WITNESS: I wouldn't know whether he does or not, sir.

THE COURT: Mr. Scrivener, are you going to say something?

MR. SCRIVENER: I was just going to volunteer that I, perhaps,

86 know more than Mr. Thomas would.

THE COURT: That you what -- well, you will be testifying later.

MR. JACKSON: I object to any further about the relevancy of the case. Mr. Scrivener is going to be on the stand later.

THE COURT: Why don't you bring it out with Mr. Scrivener?

BY MR. DOWDEY:

Q. All right. See what I can do about this thought. I didn't ask you about Fireman's Insurance. I asked you who placed the insurance at Perpetual. A. That is not my department. I imagine the insurance department places it.

Q. Do you deal through an insurance agency? A. Yes.

Q. What is that agency? A. Fireman's Insurance Company.

THE COURT: Is that an agency or is that the company that insures?

THE WITNESS: That is the company, sir, I am sorry.

BY MR. DOWDEY:

Q. Do you deal through an agency? A. Agency would be the Fidelity Investment Company.

87 Q. The agency for Fireman's Insurance Company is Fidelity Investment Company, is that correct? A. That's correct.

Q. And Mr. Crowell is a manager of Fidelity Investment Company, is he not? A. That's correct.

Q. Now, and who are the directors of Fidelity Investment Company? A. Mainly the directors of Perpetual.

Q. All the directors of Perpetual are partners in Fidelity

Investment Company?

MR. JACKSON: These are facts which are stipulated to, or part of the stipulations we agreed to at the very beginning of the case. Do we have to dwell on it any more?

THE COURT: If they are stipulated, I don't see why we have got to dwell on them any further.

MR. DOWDEY: That was not the precise stipulation, but I understand now. I have no misunderstanding about this at all, that all of the directors of Perpetual are partners in Fidelity Investment Company.

THE COURT: That isn't what he said. He said they were directors.

MR. DOWDEY: I am asking -- I wish you would permit me to ask him this, Your Honor.

88 THE COURT: All right, you can ask him.

THE WITNESS: What was the question?

BY MR. DOWDEY:

Q. Are all of the directors of Perpetual partners in Fidelity Investment Company? A. I don't know the relationship whether they are partners, whether it is a corporation or how. I don't know that. They are directors of that Fidelity Investment Company, yes. As to the partnership, I don't know. I am not a director.

Q. Well, now, your statement is, if I understand it correctly, that all of the directors of Perpetual are also directors of Fidelity Investment Company? A. That is my answer, yes.

Q. And Fidelity Investment Company places all the insurance for Perpetual? A. Not all the insurance, no, sir.

Q. They placed the insurance here? A. Yes, sir, Fireman's Insurance Company, then, it would have been.

THE COURT: Do you have any further questions of this witness?

MR. DOWDEY: Your Honor, without looking at this file, I would -- I don't have any further questions at this moment.

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43 RICHARD WILLIAM ISRAEL
DIRECT EXAMINATION BY MR. JACKSON

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51 Q. In the group of people who attended that sale, do you have a recollection of there being in attendance people who are customarily present for purchase of real estate or experienced in real estate purchases? A. Yes, sir.

Q. What do you remember about it? A. Well, I think some of the -- what we call speculators were there.

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CROSS EXAMINATION BY MR. DOWDEY

89 Q. Mr. Israel, does your company mail out notices of these sales? A. No, sir.

Q. Who mails out the notices? A. What notice is that, sir?

Q. Notices of the sale, different people -- let me show you Defendants' Exhibit 12. Do you mail out such notices as that? A. We

90 don't mail out this particular notice, no, sir.

Q. Who mails those out? A. I think this particular one is probably mailed out by the Perpetual Building Association.

Q. By Perpetual; is Thornton Owen the head of your company? A. Yes, sir.

Q. Is he connected with Perpetual? A. Yes, sir.

Q. What connection does he have with Perpetual? A. He is head of the Appraisal Committee.

Q. What? A. Head of the Appraisal Committee.

Q. Of Perpetual? A. Yes, sir.

Q. Is he a director of Perpetual? A. He is Chairman of the Board, I believe.

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3 SAMUEL SCRIVENER, JR.
DIRECT EXAMINATION BY MR. JACKSON:

Q. Will you state your full name, please, sir? A. Samuel Scrivener,Jr.

Q. Where do you live? A. 2543 Waterside Drive, Northwest, Washington, D C

Q. What is your business or profession? A My principal occupation is that of a lawyer. I am a member of the firm of Scrivener & Parker and we specialize in patent law.

Q. And where is your office? A. 1518 K Northwest.

Q. Mr. Scrivener, what is your connection, if any, with the Perpetual Building Association? A. I am Vice-Chairman of the Board of Directors. I am Vice-Chairman of the Executive Committee and General Counsel.

4 Q. And how long have you been General Counsel with the Company? A. Since Arthur Bishop's death in about 1938, I think.

Q. As a matter of practice, as a general rule, what is the practice of the Perpetual Building Association in naming you as a Trustee under the Deeds of Trust securing conveyances? A. I think that the practice probably originated 25 years ago, perhaps, and probably originated just with instructions to the title companies to put my name and that of Mr. Crowell on and it has just been carried on. As far as I know, it is just something that the title companies have done for years and continued to do.

Q. What is the connection of Mr. Crowell with the Perpetual Building Association? A. Mr. Crowell is the Manager of Fidelity Investment Company and Fidelity Investment Company is a partnership which is composed of all of the Perpetual directors.

Q. Does, except for the fact that Fidelity Investment Company is comprised of the directors of the Perpetual Building Association, does it have any other connection directly with Perpetual Building Association? A. Only to this extent: One of the things which the Fidelity Investment Company does is to act as broker, I suppose, for

5 insurance and a certain portion of the mortgage insurance which Perpetual requires is handled, you might say, through Fidelity.

Q. Now, Mr. Scrivener, do you have a recollection of the time when you were called on as the Trustee under a Deed of Trust securing Perpetual with respect to the property at 1743 18th Street, Northwest? A. I remember the case very well.

Q. Now, do you have any personal recollection of the time when you first learned of the necessity of foreclosing this property?

A. No, I don't.

Q. Well, there came a time in January of 1958 when the property was, in fact, foreclosed; is that correct? A. That's correct.

Q. And do you have any recollection of attending the sale?

A. I did not attend the sale.

Q. At that time, however, in your capacity as counsel for the Perpetual Building Association, did you have to examine into the law and know the state of the law with respect to the priority of federal tax liens over prior recorded mortgages and deeds of trust? A. Yes, that's correct. At about this time or possibly earlier, the question was

6 very much alive. I recall that the title companies here also took the attitude that a sale under a Deed of Trust or a foreclosure under a mortgage did not eliminate or remove a federal lien and so the matter was of considerable interest; and I recall that this particular case was, I believe, one of the earliest in which the question came up, and I did study the law with respect to that.

Q. Do you know the position that was being taken by title companies with respect to the priority with respect to whether foreclosure under a prior mortgage eliminated or removed -- A. Yes, as I said --

Q. -- federal tax lien? A. Yes, as I said, title companies here in the District of Columbia and Maryland were taking the attitude that a sale under a Deed of Trust did not remove a federal tax lien.

Q. Do you know when it was decided by the Supreme Court of the United States that federal tax liens did not take precedence over a prior recorded mortgage? A. That was in the Brosnan Case in 1960.

Q. Now, at the time of the sale, first sale of this property in January of 1958, do you have any recollection of whether the sale was made, or do you know whether the sale was made subject to the purchaser's assumption of responsibility for federal tax lien? A. I re-

7 call very well that the Trustees instructed the Auctioneer to tell the purchasers that the purchaser would have to pay the lien or

to take care of the lien.

Q. Now, after that sale took place, did you learn the price which the high bidder was to pay? A. I did.

Q. Do you remember what it is now? A. $12,050.

Q. Did you afterwards become aware that the purchaser, through his attorney, had declined to close the transaction? A. I certainly did.

Q. Now, did you reach any determination as Trustee or otherwise as to whether or not -- as to what to do about the refusal of the purchaser to carry out the terms of the bid? A. I certainly recall that exceedingly well. I might say that the complaint in this suit alleges that we permitted Col. DuMond to avoid this contract or this agreement to purchase whatever it was and that is not right at all. We gave very serious consideration to the alternatives which we had.

Number one, but not necessarily in this order, was that we could forfeit the $500 deposit. Our other alternative was to file a suit against Col. DuMond for specific performance. That seemed out of the ques-
8 tion. In the first place, he lived up in Pennsylvania and we would have to hire some Pennsylvania attorneys at cost, I am not sure who. He was also in the Army. He was also stationed in some secret installation; I don't know at all what it was. He was practically, you might say, unreachable as an individual. We couldn't sue him in the District. He was represented by very able and energetic counsel. If we had sued him for specific performance, the property which was in a very bad condition, would have sat there and deteriorated. If we had sued him for specific performance and gotten the $12,050, we would have paid off Perpetual to the extent of, I think, $12,000 and possibly some attorneys' fees, and I don't know who that would have helped.

Also, there was some question who was going to get any surplus. Mr. Franklin Garrett, had what he believed was a second Deed of Trust. There were recorded liens and mechanics' liens, federal liens, and it

just seemed to be a -- a fruitless thing to even consider a suit for specific performance. We felt that the best thing to do was to forfeit the $500 deposit as, I suppose, you'd call it, a liquidated damage.

Q. Now, were you aware that Col. DuMond was represented by counsel who took the vigorous position he wasn't required to complete
9 the transaction? A. I was exceedingly aware of that.

Q. Does that mean that you looked upon this matter as, however you might, whatever position you might take, at least it was a contested matter? A. It was very much a contested matter. I recall Mr. Fink, in the correspondence, at least, took the attitude that his client did not have to do anything at all. It was only subsequently that Mr. Fink agreed that $500 deposit could be forfeited.

Q. Now, in making the determination to accept a forfeiture of the deposit, did you then conclude that it was necessary to resell the property? A. I wonder if I could go back on one thing, Mr. Jackson. There was another alternative available under the terms of the sale, which was that we could sell the property again at the cost and risk of purchaser. Now, how you go about that, I am not quite sure, but, in any event, I suppose that we would have to sell the property again and then sue Col. DuMond; and, as I said, it was almost hopeless to think of a suit.

Q. Well, in that case -- A. And, in any event, after the first sale, we had no reason whatsoever to think that we wouldn't get the same price at another sale.

10 Q. In case you undertook to bring a suit for damages, you would not have been able to forfeit the deposit, would you? A. I believe that's right.

Q. Is that the view you took of it at that time? A. That's correct.

Q. That is to say, you can't forfeit the deposit and sue for damages, too? A. Well, I would only say this without going into any legal conclusions about that. We exercised the best judgment that we

possibly could and I think we did the right thing and I'd do it tomorrow.

Q. Now, at the time that you made this decision and undertook to call for a resale of the property, you say you had no reason to believe that the property would bring a lesser price than it did the first time? A. No, I don't think that's right. We had no reason to believe it.

Q. As a matter of fact, were you aware of appraisals which were in the file of the Perpetual Building Association? A. I know that certain appraisals were made. I know that there were three attempts, I believe it was three attempts, to have the federal lien removed, and when you make an application for the removal of the lien, you have to
11 submit an appraisal, so all of these appraisals were made.

Q. Now, did there come a time prior to the second foreclosure when the Executive Committee of the Perpetual Building Association considered how to go about holding the second sale? A. Whether or not it was a matter taken up in the formal meeting of the Executive Committee, I really don't know.

Q. Well, was there a meeting with Mr. Baltz and others involved in making this determination? A. There was. In fact, I don't believe that it was at a formal meeting.

Q. Well, was there a discussion with Mr. Baltz? A. There was.

Q. And is Mr. Baltz the head of the Perpetual Building Association? A. That's right.

Q. In fact, as well as name. A. Sure, that's right.

Q. What Mr. Baltz says is usually done. A. Unless we veto him.

Q. Sir? A. That's all right, I just made a remark.
12 THE COURT: Did you ever do it?

THE WITNESS: It has been done. Yes, it has, Your Honor.

BY MR. JACKSON:

Q. At that time was there a discussion of what the Perpetual Building Association should do with respect to this problem of federal

tax lien? A. Yes, as I said before, at the first sale, the Auctioneer was instructed to tell the prospective purchasers that the actual purchaser would have to pay the federal lien or take care of it, and we knew that that was somewhat of a hindrance. We wanted to get the best price and, so, after discussion, I recall very well that Mr. Baltz said to sell the property and that the Trustees were to deliver perfectly good title and that the federal lien had to be paid, if the federal lien had to be paid, Perpetual could pay it.

Q. So that Perpetual Building Association had decided, prior to the second sale, that they would make the property available for sale without any reference to a tax lien and take any chance that there might be, or, that the tax lien would be held superior to the Association's first lien? A. That is correct.

Q. Do you remember attending the second sale? A. I do. I did attend it.

13 Q. Do you have any recollection of seeing who was there? A. I recall that there were several people there. Whether there were eight or ten, I wouldn't know, at all. I recall that there were several people there because we all went inside the property and we all, kind of, were milling around looking at it.

Q. Do you have any recollection of seeing Mr. Bartow present? A. I believe that he was.

Q. Do you have any recollection of anybody else that you could name being present besides you, and was Mr. Crowell there? A. Yes, he was.

Q. Was Mr. Thomas, Mister -- A. Yes, he was. We all went together.

Q. And Mr. Israel was the auctioneer? A. He was.

Q. Do you recall, any recollection of anybody else? A. Some time later I was told, I believe, that Mr. Sheridan was there. Frankly, I don't know whether he was or not. I never saw him until yesterday morning.

Q. Have you attended many foreclosures? A. I have.

14 Q. Did you see anything unusual or different about this foreclosure? A. The only thing unusual about it, I suppose, is the condition of the property. It was in exceedingly bad condition, had been vandalized and burnt, considerably used as a public toilet. It was in horrible condition.

Q. Had you seen the property prior to this day, the day of this second sale? A. Well, I go up and down 18th Street once in awhile. It's a habit. I suppose I had, but I had not intentionally been in there.

Q. Well, was there anything about this sale that alerted you to the proposition that the sale was not fairly held to procure at a public auction the proper notice, the highest reasonable price for the property? A. No; we did everything that we could. There was a good day, I believe. Ordinarily, if it is a bad day we call the sale off. This was a good day. We went ahead with the sale. There were a reasonable number of people there. It had been advertised five times and the usual crowd of speculators, I believe, were there. We almost have to rely on them. They come to all the sales.

Q. What part, if any, did Mr. Crowell play in any of the decisions with respect to, well, the determination to foreclose? A. Well, Mr.

15 Crowell, I would say that neither Mr. Crowell nor me make terrific decisions in this matter, to be perfectly frank. We hold property. We hold co-title. That is the bare legal title which is about all we do until something happens. Well, the usual thing that happens is that when the loan isn't paid, and then we are instructed to foreclose, which we do, in accordance with the terms and instructions contained in a Deed of Trust, and we advertise, we go to the sale, and if it's a good day we hold it. If there isn't anybody there -- I have known that to happen -- and then we will hold it off and advertise it again. But I think we did everything we could.

Q. Did you have any personal interest in this sale other than your connection with the Perpetual Building Association? A. Not the

slightest, not the slightest.

Q. Did you participate at any time in the bidding? A. No, sir.

Q. Did you participate at any time in ownership of the property? A. Never.

Q. Do you know of any advantage that the Perpetual Building Association would gain by not selling the property at the highest price
16 obtainable? A. Not the slightest.

Q. Do you know of any advantage that you personally would gain by not selling the property at the highest price obtainable? A. Not the slightest.

Q. Do your answers also apply to your knowledge of whether Mr. Crowell would gain? A. I know that my answers apply to him, that's right, they do.

Q. By the way, do you know where Mr. Crowell is during the course of this trial? A. Yes, at the moment he is in California at a church convention and he has been there for the last week or so.

Q. To which he is a delegate? A. That's correct.

Q. Has he indicated that if it is necessary he will return for the purpose of this trial? A. That's correct.

Q. Has he turned over to you his book which he keeps? A. He has.

Q. Is that that which I hold in my hand? A. I know the book and I can identify it.

Q. Can you identify his handwriting? A. I can.

17 Q. Do you recognize his handwriting for January 3, 1958? A. I do.

Q. Do you recognize his handwriting for July 9, 1958? A. I do.

Q. Are these the notes that you know he keeps in the regular course of business? A. I know that he keeps this and I looked at the book lots of times, and often, when he and I are in an automobile on the way to or from a sale, I just read the book, having nothing better to do.

MR. JACKSON: I know that under ordinary circumstances I would be required to produce Mr. Crowell to produce this book. I will show this book to Mr. Dowdey. If he wants to object to its being introduced at this time, I will not be able to introduce it.

THE COURT: You just want to introduce it as to the two entries for those two dates?

MR. JACKSON: Yes, sir.

MR. DOWDEY: I have no objection to this but I hope this is not in lieu of Mr. Crowell's testimony.

MR. JACKSON: Well, I am not going to take any possible chance that there be any contention that Mr. Crowell should be here to testify
18 and, accordingly, I will not offer this. I will merely ask the Court for an opportunity to have Mr. Crowell come in from California here by Monday morning.

THE COURT: We won't be through before Monday, anyway.

MR. JACKSON: You may inquire.

CROSS EXAMINATION

BY MR. DOWDEY:

Q. Mr. Scrivener, you testified to the fact that you are a partner, I take it, in Fidelity Investment Company? A. I am.

Q. And that company is engaged in an insurance agency, or brokerage business? A. That is one of our lines of business.

Q. I see. And they have dealings with Perpetual on such matters, on insurance matters, is that right? A. Have dealings with?

Q. Yes. A. If you wish to put it that way, I don't what you mean.

Q. Well, tell me, what does Perpetual, what business dealings with Perpetual, what dealings would Perpetual and Fidelity Investment Company have? A. Whenever we make a loan that is secured by a
19 mortgage, a deed of trust, the property must be insured to the amount of the loan. If the people come in and they have an insurance policy, insurance company that they like, they can put it anywhere

they want. But if they don't have any, why, our Insurance Department, which takes care of all insurance matters, may write it through Fidelity.

Q. In other words, if the borrower doesn't designate anybody else, it is written through Fidelity, is that right? A. Not in a hundred per cent of the cases, but a lot of them.

Q. And Fidelity earns a commission on that? A. That's correct.

Q. And that commission is not turned over to Perpetual, is it? A. It is not.

Q. Now, if I understood you correctly, in your decisions about foreclosure, you said they were very limited, very few decisions you had to make? A. In the normal case, that's correct.

Q. Now, let's see if I have them correct. I mean, you would be following the instructions of Perpetual as to holding the sale? A. We would follow the instructions of Perpetual to have the sale. We would
20 follow the instructions contained in the Deed of Trust as to how to have the sale.

Q. And you say that you would advertise the sale? A. Correct.

Q. You advertise the sale, or does Perpetual? A. We do.

Q. Do you send out notices? A. No, I do not personally. I do not personally put a notice in an envelope and put a stamp on it, if that is what you mean.

Q. Who sends out the notices? A. Mr. Thomas.

Q. Of Perpetual? A. We delegate him to do so, that's correct. He's got a staff and handles such things, so we have delegated him to put the thing in the envelope and put a stamp on the envelope, if that is what you mean.

Q. Well, does he -- A. We use Perpetual stamps on it.

Q. Do you write up the notices? A. I sign my name to a blank form -- not a blank form, I'm sorry -- I sign my name to a printed form.

Q. That is prepared by whom? A. By a stenographer at Perpetual Building Association under direction of Mr. Thomas; we dele-
21 gate him to see that somebody plays the typewriter.

Q. I beg your pardon? A. We delegate Mr. Thomas to see that somebody types the thing up. It is our responsibility to see that it is done and we see that it is done. Whoever types it up is somebody else. I can't type.

Q. Now, since these notices are made out in Perpetual's office under Mr. Thomas' direction, does he also determine who they are to be sent to? A. In collaboration with us, yes. We have the primary responsibility and we see that that responsibility is carried out. We might get some help from him. He knows much more about the loan than we do.

Q. Do you send a list of people to him to have these things typed up, or what? A. No; there are 24,000 Deeds of Trust and I certainly don't know all the names and the Second Trust holders who are involved, but whenever one of these things comes up I make sure that the notices have gone out and they have gone out, so far as I can read the files, to the right people, Second Trust holders --

Q. And you rely on Mr. Thomas to provide that information?
22 A. I do not.

Q. You do not? A. I do not.

Q. Where do you get that information? A. From the Perpetual file.

Q. From the Perpetual file? A. That's correct, no place else that I could possibly get it.

Q. Which is maintained by Mr. Thomas? A. What?

Q. Which is maintained by Mr. Thomas? A. No; that is maintained by the Secretary of the Association.

Q. Who might that be? A. That is part of the general files.

Q. Who might that be? A. W. S. Martindill; that is just a part of the general files.

Q. Now, getting to the files, I take it that you have no file on this matter? A. My file is, I suppose, about a hundred per cent mainly reproductions of the Perpetual file.

Q. Now, the Perpetual file that you refer to is what file? Is that the file that Mr. Martindill -- A. One that you are going to look
23 at over the weekend.

Q. That is the one that -- is that kept by Mr. Martindill? A. Mr. Martindill is the Secretary of the Association. Under the Constitution and By-laws of the Association, the Secretary is, in general, in charge of the files. There are 24,000 loan files. Mr. Martindill does not sit there every day and kind of watch them. I suppose, technically, they are under his supervision, but there are lots of girls to add papers to the files, et cetera.

Q. Do you keep a file separate and apart from that? A. With respect to what?

Q. With respect to your sales of this property. A. This property?

Q. Yes. A. Nope.

Q. You do not? A. I do not.

Q. You keep no separate files? A. I do not. That is just exactly what I said a moment ago.

Q. Does Mr. Crowell keep a separate file? A. Well, he keeps a book which Mr. Jackson has showed me which I identified. So far as
24 I know, he doesn't keep any other records.

Q. Do you keep a book? A. No -- I keep a diary, yes, of all of the things which I do all day, yes.

Q. And would that include -- would that be able to tell you what happened on a particular day with reference to this trust? A. Well, it would tell me that on July the 9th, 1958, I attended this foreclosure sale.

Q. It would? A. It would.

Q. And would it tell you about meetings of the Executive

Committee? A. No; I attend those every Thursday morning at ten o'clock, so I don't have to put it in the book -- yes, it would tell me. That is quite right, yes, it would. Ordinarily it would. Ordinarily it would.

Q. Would it make any mention of this particular discussion about this property? A. I am sure it would not.

Q. It would not? A. No.

Q. You have no note or memoranda or book or anything that
25 mentions this property, then, other than showing that on one date you attended a sale; is that right? A. If I look through all of the 1957 and '58 entries in the diary, I might possibly find that I had a conference or something about it. I don't know. I haven't looked. I have the diary here if you'd like to look at it over the weekend.

Q. Well, could you look at it and find out if you have any memoranda in there?

THE COURT: Now, I am not going to wait here while he looks through '57 and '58.

MR. DOWDEY: I am not suggesting that, Your Honor. I think, coming back here Monday --

THE WITNESS: Let me say this: That to my best knowledge and recollection at the time -- I mean at this moment -- there would be no entry with respect to this specific loan other than the July 9, 1958 entry showing that I went to the sale.

BY MR. DOWDEY:

Q. And you will, over the weekend, look into that and if there is another entry, you will tell us, will you? A. If I am instructed to by the Court.

MR. DOWDEY: May I have him so instructed, Your Honor?

26 THE COURT: Well, I don't know what, really, your theory is here. I suppose it suits your purpose better if there isn't anything in there, doesn't it?

MR. DOWDEY: I don't care whether it suits my purpose better or

not. I understand that we are here to scrutinize very carefully what Mr. Scrivener did.

THE COURT: That is true.

MR. DOWDEY: And I would think that if Mr. Scrivener wants to -- takes that as a serious responsibility, he would be only too glad to produce that, any information he has.

THE WITNESS: I have no objection --

THE COURT: Well, now, just a minute. Mr. Scrivener, would you be so kind, during the weekend, as to check '57 and '58 in your diary?

THE WITNESS: I will, Your Honor.

BY MR. DOWDEY:

Q. Now, apart from that, though you have no other file, record, memorandum, apart from Perpetual's file, is that right? A. Just trying to recollect whether I had any correspondence; no, I don't believe I have any other file other than the contents of the Perpetual file.

Q. Now, so that your testimony, so far, has been based entirely on your unaided recollection of events, is that right? A. I think it is
27 a good recollection. I have an excellent memory.

Q. And your activities in respect of this particular transaction are very clear to you today, is that right? A. They are exceedingly clear.

Q. All right. Well, now, you tell us the first time, first time you had any vivid recollection of doing something with respect to this property. A. Prior to the first foreclosure sale in January of 1958, as I said before, there is a great deal of legal commotion about the effect of a Trustee's sale on a federal tax lien. As I said, the title companies have taken the attitude that such lien would not be removed by sale. There were conflicting decisions in the Circuit Court of Appeals in one of the Northern States and in Texas, and I must say the matter was in considerable confusion and I studied it later on.

Q. Well, now, just tell me when you had a vivid recollection.

A. I am trying.

Q. With respect to this property. A. I am trying to tell you so that just prior to the foreclosure sale, I think it was, Mr. Thomas and I went to see Mr. Leonardo, who was the Internal Revenue fellow in
28 this area, and we tried to get some statement out of him as to what the attitude of the IRS was and he rather led us to believe, as I recall, that the IRS would probably release the property because they didn't think that the value was there.

Q. Now, before you go any further, is that your first vivid recollection of having anything to do with this property? A. The property had been a subject of considerable discussion, I might say, from time to time, because nobody ever paid their debt to Perpetual, was always in trouble. There had been a fire, and, let's see, the fire loss was -- first recollection had to do with the fire loss and the application of the fund which, I believe, was in '57. I may be wrong; '55, I guess it was, yes.

Q. Well, Mr. Scrivener, I appreciate that you have acted as counsel in this case, filed briefs and as such have familiarized yourself with these matters, but I want to know now what your first vivid personal recollection, independent of what you have learned as counsel.
A. I am trying to think --

Q. With respect to this matter. A. I am trying to think of the first. Remember, you wanted the first.

29 (There was a short pause.)

Probably when the application of the insurance fund came up, which I think it was, in 1955. I didn't recall, at all, the making of the loan. I don't know anything about that, so that the matter probably came --

Q. How did that come up? A. What?

Q. How did that come to you? A. What's that?

Q. The transaction you are just describing; you said this is your first vivid recollection. Now I want to know how it came to your

attention. A. Mr. Thomas spoke to me about it one day.

Q. Do you remember when? A. No.

Q. Where? A. Yes, at Perpetual.

Q. At the main office downtown? A. Correct.

Q. Do you recall what he said? A. He said that Mr. Sheridan had made the payments, that this thing was -- had always been in trouble, that Mr. Sheridan had assigned the property, had deeded the
30 property to Schnitzer, Hollander's wife, that Hollander, or, rather, Schnitzer had turned the property over to 1823-25 Jefferson Place, Northwest Company, that they hadn't made any payments on the lot, that the thing had been damaged, and that only half repaired, nobody made the payment on the loan. Hollander was in jail, and what were we going to do, and he said, "I think you ought to take" --

Q. Just a moment. And this is the first time, first time you had any definite recollection? A. Why don't you let me finish and then ask me? Q. Very well. A. Thank you. Then he said that the thing was in such a mess that he thought that the insurance fund, or what was the balance, should be used to reduce the loan. I think he got Mr. Baltz's okay on that and that was done.

Q. And that is your first vivid recollection of anything with respect to this property? A. I think so. If you can correct me on that I wish you would.

(There was a short pause.)

MR. JACKSON: Are you finished?

MR. DOWDEY: If you will indulge me just a moment.

BY MR. DOWDEY:

Q. Was this occasion, which you describe, before or after the
31 first sale? A. Before; I believe it was.

Q. When was your next? A. No, it was after the first sale.

Q. It was after the first sale? A. Yes.

Q. And that transaction you described is your first vivid recollection? A. My first vivid -- I'm sorry -- my first recollection, as

I said before, had to do with this income tax lien business.

Q. All right. So, the event about applying the insurance proceeds was your second vivid recollection? A. I believe -- my second recollection was the debate about what to do about the first sale after Mr. DuMond, through his counsel, Mr. Fink, decided that he would contest the matter of forfeit and we had considerable -- had discussion about that. That was immediately following the first sale.

Q. Are you familiar with the letter of Mr. Fink about that -- his inability to obtain a release of the income tax lien? A. I was familiar with all of the correspondence of Mr. Fink.

32 Q. Well, that particular letter, are you familiar with that? A. Yes.

Q. Did you have any other facts about that before you -- A. About what?

Q. About this claim for the return of the deposit? A. Well, as I said, we had consulted with Mr. Leonardo and Mr. Machiz and Mr. Solomon in Baltimore.

Q. When? A. Oh, this was about the time, earlier than the first sale.

Q. This was before the first sale? A. It was about the time of the first sale.

Q. Well, now, was it before or after the letter from Mr. Fink? A. I can't answer that. I don't know the date of the letter of Mr. Fink, but I do know --

Q. Just a moment. We'll help you -- A. Well, I can say this, that Mr. Fink didn't come into the business until Mr. DuMond, or Col. DuMond retained him and that was after the sale, I believe. I believe -- and I believe that our discussions with Mr. Leonardo and Solomon were before the sale. We wanted very much, if I might say, to get the highest price we could and we were anxious to get the IRS to waive the

33 lien.

Q. All right. So, the first vivid recollection you have, let's go

over this again, is when --

MR. JACKSON: I think we have been over enough, if Your Honor please. I don't want to object, but I don't want to be here all night on a series of irrelevant questions. I don't know what difference it makes, in any event. If it were the first time he asked, I wouldn't make any --

THE COURT: I think I will sustain the objection to that particular question, because I think it has been adequately covered.

BY MR. DOWDEY:

Q. Do you recall any other specific occasions, specific occasions when you have a vivid recollection of saying something and doing something with respect to this property other than those you described just recently? A. I recall the second sale. I recall the application which we made to Internal Revenue Service for the release of the lien. I might say that it's been in my consciousness since 1958, I guess, but what with our foreclosure sales, liens, lawsuits and what-not -- (pausing)

THE COURT: Do you have any further questions?

MR. DOWDEY: I beg your pardon?

THE COURT: Do you have any further questions of this witness?

34 MR. DOWDEY: If Your Honor will indulge me a moment.

(There was a short pause.)

BY MR. DOWDEY:

Q. In all your recollections, Mr. Scrivener, do you recall ever having any discussion with Mr. Sheridan or Mr. Sheridan's representatives? A. Well, let's see. With respect to Mr. Sheridan, himself, I must say that to my best knowledge I never saw the gentleman until yesterday morning, never talked to him, and who Mr. Sheridan's representatives are, I don't know. What do you mean? Mr. Bartow?

Q. Well, I -- A. I don't think I have discussed the case with Mr. Bartow.

Q. Well, you made a statement that we have had some litigation here, and you have discussed it with us, but at the time, between the

first and second sale, you had no discussions with Mr. Sheridan or with anybody that purported to represent him, is that right? A. Between the first and second sales?

Q. Yes. A. Well, Mr. Sheridan was sort of out of it. No, I
35 never had any discussion with him, no.

Q. Did you ever write anything to him? A. Me?

Q. Yes. A. My recollection is that we instructed that a notice of each of the sales be sent to him, yes.

Q. Nothing other than that? A. I don't think so. As I say, he was out of the picture. He didn't even own it.

MR. DOWDEY: I have no further questions, subject, of course, to what this file may disclose.

THE COURT: Do you have any questions?

MR. JACKSON: What what file may disclose?

THE COURT: Well, I take it, this diary.

MR. JACKSON: Sir?

THE COURT: I take it, this diary, or when he looks at that file there.

MR. JACKSON: Oh.

THE COURT: Do you have any other questions?

MR. JACKSON: I have no other questions of Mr. Scrivener.

THE COURT: Mr. Scrivener, something puzzles me. You say between the first and the second sale that the plaintiff in this case was out of it.

36 THE WITNESS: In 1955 Mr. Sheridan sold the property to Shirley Schnitzer, who is the wife of Hollander, and Mr. Hollander, who went to --

THE COURT: I appreciate that, but the man is still the maker of a $12,000 note which you are a Trustee for, to take care of his interest. Now, what do you mean by "he is out of it"?

THE WITNESS: Well, I mean this: That we were attempting to get the highest price but I don't -- he received the notices and I think that that was all that there was -- I mean, all we did. I don't honestly

know, Your Honor, what else we could have possibly done with him.

THE COURT: Not what you could have done, but your statement astounds me, particularly in view of this case. It could be given the implication that you weren't in the slightest concerned with Mr. Sheridan or his interest.

THE WITNESS: We were concerned that we -- well, let's examine that just a moment.

THE COURT: Well, it's your statement, not mine.

THE WITNESS: Yes. If we had sold the property for $20,000 I don't believe that he would have benefited and if we sold it for $10, it is not our practice or policy to sue for a deficiency.

THE COURT: Well, in this case, you took a deposit and applied
37 it towards the note.

THE WITNESS: That's right, sir.

THE COURT: Well, in any event, one other question. What dictated the delay between the first and the second sale, or what caused the delay, or, to what is the delay attributable?

THE WITNESS: There was the question of the tax lien. Subsequently to the first sale, Mr. Fink -- I think it was after the first sale --

THE COURT: Well, you had correspondence with Mr. Fink up until the middle of February, at which time the deposit was forfeited. So I can see the reason for the delay to the middle of February, but what caused the delay from February to July?

THE WITNESS: At the moment, sir, I don't know.

THE COURT: All right. Suppose we take our recess at this time.

(Thereupon a short recess was taken.)

THE COURT: Do you have any further questions, Mr. Jackson?

MR. JACKSON: Yes, sir.

REDIRECT EXAMINATION

BY MR. JACKSON:

Q. Mr. Scrivener, are you, as a result of this case and its

pendency, familiar with the files of the Perpetual Building Association, Mr. Thomas' files? A. I believe so.

Q. In connection with the delay between the first and second sale, were you aware that first there was this controversy with Mr. Fink, which came to an end when the deposit was forfeited in February, late February of 1958? A. That's correct.

Q. Correct. Do you remember that there was an application made to the District Director of Internal Revenue to procure a release of the federal tax lien? A. I do. I refreshed my recollection on that by reference to my file during the recess, and I saw a letter from Mr. Baltz and Mr. Hollander, May 7, 1958, which stated that since the first foreclosure sale Mr. Scrivener and Mr. Thomas had been attempting to secure a release of the lien.

Q. And do you recognize the document which I show you and is dated May 9, as an application to the Bureau of Internal Revenue for discharge? A. I recall it very well.

Q. Do you recognize this letter from Irving Machiz dated May 19, as a response? A. I do.

Q. What is his response there dated May 19? A. He acknowledges
39 receipt of the application of May 9, 1958 for release of lien and attaches documents and advises that it has been processed in the IRS.

Q. Now, do you know that appraisals were obtained from sundry appraisers? A. Yes, I do.

Q. Do you recognize the document dated April 23 signed by Charles C. Koones as one obtained and do you know for what purpose it was obtained? A. Yes; under IRS regulations, it is required that, I believe, two appraisals be submitted with the application for removal of the lien and this was the appraisal secured from Mr. Koones.

Q. Do you recognize, do you know Mr. Koones as a prominent and experienced appraiser in this city? A. I have known him for years as such.

Q. Do you also know Mr. Frank J. Luchs? A. I have and I do.

Q. Do you know him as an appraiser of real estate? A. I do.

Q. Of Shannon & Luchs? A. Yes.

Q. Do you recognize the second document that I hand you there as an appraisal received from him? A. That is Mr. Luchs' appraisal.

40 Q. Do you remember what disposition the Bureau of Internal Revenue made of the application for release? A. I do. The application was denied.

Q. Do you know when it was denied? A. It would have to be subsequent to May 19, but I don't recall the exact date now. I say May 19 because that was the date on which the Internal Revenue Service acknowledged receipt of the application.

Q. In connection with that, are you aware that the Perpetual Building Association also received a letter from Mr. Leonardo, Revenue Officer in Internal Revenue Service, advising of a tax lien of $2,313 against Mr. Sheridan? A. I have seen this letter in the Perpetual Building Association files.

Q. Do you know that the Perpetual Building Association was served with the tax lien described and is that paper that I show you a copy of it? A. I have seen this. In fact, I saw it the day it was received, which was June 18, 1958.

Q. Do you recognize the letter of July 8, 1958 from Irving Machiz to Mr. Thomas as the final letter stating the disposition of the application for a release? A. I recall this. I saw it the day it was received by

41 Mr. Thomas.

Q. So it was received the day before the sale? A. That's correct.

* * * * * *

45 RECROSS EXAMINATION

BY MR. DOWDEY:

Q. In your capacity as Trustee, did you ever receive any reports that there have been -- reports of vandalism of this property?

A. I heard that there had been. I observed vandalism when I was there at the time of the second sale.

Q. Prior to the second sale had you received any information

46 of that? A. I believe that I was aware that there had been.

Q. When did you receive such reports? A. I am afraid I couldn't tell you. There was certainly no formal report.

Q. Did you -- there was no formal report? A. I don't believe so.

Q. Do you know whether the property was occupied or vacant? A. Vacant.

Q. How long had it been vacant? A. Several years.

MR. DOWDEY: Will you mark these, please. Let's see, this is first and this is second.

THE DEPUTY CLERK: Plaintiff's Exhibits 11 and 12 for identification.

(Report of Condition of Property was marked Plaintiff's Exhibit No. 11 for identification.)

(Report of Condition of Property was marked Plaintiff's Exhibit No. 12 for identification.)

BY MR. DOWDEY:

Q. I show you what has been marked Plaintiff's Exhibits 11 and 12 -- 11 for identification at the moment, and ask you if you ever have seen that before? A. I have seen it in the files of Perpetual Building Association.

47 Q. And do you recall when you saw it? A. No, I do not.

Q. Was it at this time, July 26, 1957? A. I recall having seen it when I went over the files just within the last week or so. I don't recall whether I saw it in '57 or not.

Q. I see. Will you read to the Court what that says --

THE COURT: I can read it. He doesn't have to read it.

MR. DOWDEY: Very well.

BY MR. DOWDEY:

Q. I show you what has been marked Plaintiff's Exhibit 12 for identification and ask you if you have seen that before? A. Yes, I remember having seen this in or about the time that it was written, December 12, 1957, because of one statement in it, which says that the

tax lien was tacked on the front door, which you don't often read; and I just happened to remember that.

Q. Did this come up in connection with the Executive Committee meeting of that same date, December 12, 1957? A. I don't recall that there was a meeting on that particular date, but I don't believe that this

48 probably came.

Q. You do not believe that it did? A. I don't believe so. We would ask for a report on the property, but I don't know that we would have that particular document before us.

Q. You mean, somebody would render a report orally?

A. That's correct, yes.

Q. Perhaps from this document? A. That's correct.

MR. DOWDEY: I offer these into evidence, Your Honor.

THE COURT: Any objection?

MR. JACKSON: No, sir.

THE COURT: They will be admitted.

(Plaintiff's Exhibits Nos. 11 and 12, heretofore marked for identification, were received in evidence.)

THE COURT: Let me see it. All right. Anything further?

MR. DOWDEY: Yes.

BY MR. DOWDEY:

Q. In connection with this problem about the tax lien, you considered this before the first foreclosure --

THE COURT: Now, we have got two liens. Which one are you talking about? Remember, we have a $4,000 one now and a $2,000 one.

49 BY MR. DOWDEY:

Q. With respect to the lien on the real estate, the 1823-25 Jefferson Place Corporation, a tax lien of $4,000, this is the only one that you considered in connection with the property, is it not?

A. No, I think not. At the time of the first sale, we were attempting to get some concessions out of IRS and I believe that was with respect to the Sheridan lien.

Q. Before the first sale? A. At the time of the first sale.

THE COURT: What is the date of that lien?

BY MR. DOWDEY:

Q. Well, I'll help you out on that, Mr. Scrivener. The lien against Sheridan was not filed until long after the first sale. A. All right; then it was the 1823-25 Jefferson Place Corporation.

Q. All right. This was the one that you made the application in Internal Revenue to have removed, is that right? A. We did, subsequently to the first sale.

Q. But you had considered this problem before the first sale?

50 A. That's correct.

Q. Right. And subsequent to the first sale, Mr. Fink tried to have it removed, is that right? A. I believe that he did.

Q. And then, after he didn't succeed, you tried? A. I believe that is the --

Q. Or Mr. Thomas did? A. I prepared it.

Q. All right. And it was denied before the second sale, is that right? A. That's correct.

Q. And then, after the second sale, you continued to try to have it removed, is that right? A. We did, and I believe, 1960, for a special purpose.

Q. Finally, in 1960 it was -- A. Removed by the Brosnan case.

MR. DOWDEY: That's all.

MR. JACKSON: Well, it was removed as to the property, but as to the proceeds, was it?

THE WITNESS: That may be so.

THE COURT: Mr. Scrivener, let me ask you this: When you are appointed Trustee under a Deed of Trust and accepted, that is, a Deed of Trust to secure a loan, do you enter into a trust relationship

51 with both the maker of the note and the payee of the note, each of them becomes your cestuis and each of them, to each of them whom you owe a duty to be faithful to your trust. Now, in this particular case,

after the first sale and the difficulties that arose, you consulted one cestuis, namely, the Perpetual, constantly, but apparently you never even got in touch with, consulted, or gave any consideration to the other cestuis, the maker of the note. Now, why is that?

THE WITNESS: It seems to me, Your Honor, that his interest was solely financial, that his obligation, if any, would come into being, you might say, depending entirely on one thing, which was the price received at the foreclosure sale, and it seems to me that our obligation was to see that they -- that we got the highest price.

He had no obligation whatsoever. If we got a sufficiently high price --

THE COURT: Did you have any greater obligation to the Perpetual? They were likewise interested simply in the highest price, at least up to the value of this property, were they not, for their Deed of Trust note?

THE WITNESS: Yes, I think that's right.

THE COURT: And, yet, you saw fit to consult with them constantly and, yet sofar as your testimony goes, you have never yet consulted with

52 this maker of the note, to whom you owed a duty. You have never asked him whether or not you should forfeit the deposit on the first bid, you never asked him if he wanted to advance the funds to sue, or what he would prefer you to do; not that you would be bound by it in the slightest, but you are consulting one cestuis and not the other, and that puzzles me.

THE WITNESS: Well, I believe that at first, and the second sales, number one, Mr. Sheridan was advised that there would be one. Either Mr. Sheridan or his representative was there. I believe that they possibly had some obligation with respect to their own interests.

THE COURT: Maybe they did, but Perpetual knew the sale was there, too, and Perpetual knew what the situation was and, yet, you saw fit to consult Perpetual about whether you would forfeit the deposit or go ahead and sue, but your other cestuis, to whom you owed an equally high duty, it seems to me, you completely ignored.

THE WITNESS: Well, it seems to me, also, Your Honor, that

Mr. Sheridan, and subsequently the 1823 Corporation, had our money, the Association's money.

THE COURT: It didn't have any cent of your money as a Trustee, not one single, solitary penny.

THE WITNESS: That is agreed, understood, Your Honor.

53 THE COURT: Well, I have no further questions.

* * * *

90-A Washington, D. C.
October 8, 1962.

* * * *

91 THE COURT: Have you read that (indicating transcript of Mr. Samuel Scrivener, Jr., on Friday, October 5, 1962)?

MR. JACKSON: I heard it.

THE COURT: Well, it seems to me --

MR. JACKSON: I have not read it, no. I have not had this before.

THE COURT: It seems to me that in view of the testimony of Mr. Scrivener that I should think they might be willing to give some consideration to settling this matter. With the state of the record, however this case is decided, if it goes up to the Court of Appeals they are going to come down with a decision that I believe they will, that Perpetual

92 will regret for the rest of the time they are in business. That is my best judgment of the thing and I am sure that there was no malfeasance in the case, and I am reasonably sure there was no misfeasance in this case, but I have an idea that whatever I do, this case would come down from the Court of Appeals with an opinion that would certainly look bad for Perpetual and it seems to me under that circumstance it might be well for all concerned if the case was settled.

Now, I don't know, it just --

MR. JACKSON: Judge, when you say that you think it would be wise to reconsider the question of settlement, that makes me think we ought to reconsider and not because I am, by that means, anticipating the decision in this case.

THE COURT: No, I frankly, --

MR. JACKSON: And I understand that.

THE COURT: I, frankly, don't know what the decision in this case is.

MR. JACKSON: I hoped that that would be.

THE COURT: As far as I am concerned, I don't know what the decision is going to be but I think your witness has said things that could be picked up to just blast this whole system and I think it might likely be. Now, it would be --

93 MR. JACKSON: Did you intend this to be on the record?

THE COURT: Well, I would just as soon go off if you don't want it on.

MR. JACKSON: I don't want it on the record.

THE COURT: Off the record.

* * * * *

Washington, D. C.
Monday, October 8, 1962

* * * * *

2 JUNIOR F. CROWELL

was called as a witness by the defendant, and being first duly sworn by the deputy clerk, took the stand, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. JACKSON:

Q. Mr. Crowell, will you state your full name? A. Junior F. Crowell.

Q. Where do you live? A. 800 Quaint Acres Drive, Silver Spring.

Q. Where are you employed? A. Fidelity Investment Company.

Q. In 1958, in 1957 and 1958, are you aware that you were named as one of the trustees in respect to certain property at 1743 18th Street, Northwest? A. Yes, sir.

Q. Did there come a time when you undertook -- when you were notified to carry out your duties as a trustee to a foreclosure?

3 A. Yes, sir.

Q. From whom did you get the instruction to proceed with the

foreclosure? A. The request came from the Executive Committee of the lender, Perpetual Building Association.

Q. Do you act as trustee in deeds of trust on other occasions in matters secured for debts of the -- due to Perpetual Building Association? A. I do.

Q. Have you got any way of indicating to the Court how many, or how frequently that occurs? A. Several times daily.

Q. You mean that you are named? A. Yes.

Q. Do you have that many foreclosures? A. No, sir.

Q. Now -- A. Did I understand you correctly, how many times I was named?

Q. Yes, well -- A. Yes.

Q. First as to name and then -- well, how frequently do those circumstances ripen into foreclosure? A. Do I understand you mean

4 they ripen into an actual sale?

Q. Yes. A. I would say perhaps three a month, something of that nature.

Q. Now, did you have anything personally to do with the making of the decision to foreclose? A. Yes, I did as trustee.

Q. As a trustee? A. That's correct.

Q. Did you have anything to do with the decision to -- in so far as determining when the debt had reached the point where it had to be foreclosed? A. No, the Executive Committee made the request of the trustees.

Q. I see; now, did you have anything to do with the sending of notices of the holding of the foreclosure sale? A. Notices preliminary to the sale? . . . Q. Yes. A. Yes, sir.

Q. What did you have to do? A. It is our practice to authorize the sale if we see that it is properly due and request Mr. Thomas of the Association to take care of the mailing under our signature.

5 Q. Do you know when the first sale of the property at 1743 18th Street took place? A. I don't recall from actual memory but if I could refer to my date book, I can give you the date.

Q. Will you please do so? A. January 3, 1958.

Q. The book you hold in your hand is a book which you keep in the regular course of your duties as a trustee? A. It is, true.

Q. And is the handwriting on that page you have before you your handwriting? A. That's correct.

Q. Is that on the date January 3rd, 1958? A. That is so.

Q. From that record, or without referring to that record, are you able to state what occurred on the 3rd of January, 1958? Do you have an independent recollection? A. I recall that we had a sale.

Q. Do you remember seeing the property? A. Yes, sir.

Q. Were you present? A. Yes, sir.

Q. Do you remember who was the auctioneer? A. Thomas J. Owen & Son.

6 Q. Do you know who, as an individual, was the auctioneer? A. Mr. Israel.

Q. Do you recall who was present? A. Without referring to my book, Mr. Thomas, myself, the auctioneer, and two or three attorneys that I recall.

Q. Now, what entry did you make in your book with respect to that? A. Respect to those present?

Q. Yes. A. I have an entry that Mr. Fink was the attorney representing Mr. DuMond and the others' attorneys I do not have there, their identity.

Q. Well, the words there are "three a-t-t-y-s, et al." Does the "et al" mean anything to you? A. Other persons, unidentified.

Q. Other persons, unidentified; well can you state then from your recollection or from the record, either one, really how many people were there? A. Not positively, to be honest with you.

Q. Do you remember what bids there were? A. Yes, there was one bid.

Q. And what was the bid? A. $12,050.

Q. And who was the bidder? A. Bid was made in the name of

7 Kenneth S. and Ann M. DuMond.

Q. Do you have any knowledge of whether or not there was any bid made on behalf of Perpetual Building Association? A. There was not to my knowledge.

Q. Not to your knowledge? A. No, sir.

Q. Let's see the force of your answer; do you know that there was no bid or is it merely that you have no recollection? A. I know there was no bid.

Q. There was no bid? A. Yes, I know there wasn't.

Q. Bid was $12,050 by DuMond? A. Yes.

Q. Do you remember anything unusual or different about that sale then any others in a specific sense? A. One particular difference; and that is that as a trustee we asked the auctioneer to be certain to include in his reading the item of an unsettled federal tax lien.

Q. Do you remember what words he used? A. I do not offhand.

Q. Did you put down on your book the exact words he used? A. I did not.

Q. Would you be able to testify in court as to -- at any time as to what were the precise words used by the auctioneer? A. I wouldn't recall, no.

Q. Do you have any precise personal knowledge as to whether or not the purchaser at that sale ultimately closed that sale and took title? A. I do have knowledge that he did not.

Q. How do you come to have knowledge that he did not? A. Terms of the sale provide the individual -- the successful bidder, the individual, in this case, Mr. and Mrs. DuMond, must settle in a specified length of time. That not being accomplished, then we made contact with him.

Q. When you say "we," whom do you mean? You personally? A. No, the trustees, Mr. Scrivener and myself and Mr. Thomas, at the Association.

Q. Did there come a time when the property was readvertised and sold? A. That's correct.

Q. Do you know on what date there was a resale? A. If I may

refer again to get the correct date -- July 9, 1958.

Q. Did you also make an entry in your book on that day?

A. Yes, sir, I did.

9 Q. And independent of that record, do you recall who was present at that sale? A. Mr. Thomas; myself; Mr. Samuel Scrivener; the auctioneer, Mr. Israel; and a number of other persons, among which was a representative from Internal Revenue and two or three attorneys that I recall.

Q. Did you have any recollection whether there were real estate people, speculators of any kind there? A. Yes, I believe Mr. Gantt was there at the time, a real estate buyer.

Q. Do you recall whether the auctioneer made any references in his recitation of the terms of sale concerning the federal tax lien on this occasion? A. Not on this occasion, no.

Q. He did not? A. Not on this occasion.

Q. And did you personally participate in any decision with respect to the exclusion of the tax lien in the terms of sale? A. Yes, prior to the sale.

Q. Tell us what part you had in making that decision. A. The part that I had was in a conference with Mr. Scrivener, Samuel Scrivener, Jr., and Mr. Thomas as to what would be our position and our instructions to the auctioneer in question.

10 Q. And what decision was made? A. Decision was made, conveyed -- first of all, the statement was conveyed to us as trustees that the Perpetual in this case would stand back of the trustees on a guarantee of good title irrespective of that particular lien, federal tax lien.

Q. Now, do you recall who was the high bidder at that sale?

A. I will have to refer to my notes if I may, sir.

Q. Please do. A. The high bidder at that sale was -- bid was made in the name of a person named Helen Brent, B-r-e-n-t, I believe it is.

Q. In what amount? A. $9,550.

Q. And did you know her to have any connection with this man Gantt? A. As I recall, he made a bid on her behalf. That is my recollection.

Q. Was that sale afterwards closed by the purchaser? A. Yes, sir, it was.

Q. And subsequent to that, did you make disbursement of the proceeds of the sale? A. That's correct.

11 Q. To whom? A. The -- I can't recall exact distribution of the fund in this case because there was in involvement with an insurance loss and I didn't bring my book or record with me indicating how we handled the settlement so I couldn't say precisely on the distribution.

Q. Well, we have stipulations as to it. Now, is this book you hold in your hand, is the book you keep -- in which you keep a record of the things that take place with respect to the foreclosures that you attend? A. That's right.

Q. Is there anything else in here besides that? A. Not to my knowledge.

Q. Will you answer the question, sir? A. Not to my knowledge, sir.

Q. And these records are kept in the regular course of your business as a chronological record of your foreclosures? A. That's right.

Q. You note that the weather on January 3, 1958 was clear and cold; is that your present recollection, or do you have any recollection other than this record? A. I don't have any independent recollection of it but I write it down, that day -- so I am confident in the reliability of

12 that judgment.

Q. Is that also true with respect to the weather on July 9? A. There was a slight difference on July 9 -- two differences. First of all, there was a light sprinkle and it was in the warm summertime.

Q. Now, in respect to the property, Mr. Crowell, itself, do you have any recollection as to its general condition at the time of the first sale? A. It was not in a very good condition at the time of the first sale.

Q. What about the second sale? A. No improvement in effect.

Q. Did it give signs of having been damaged by fire? A. Yes.

Q. Between the first and the second sale.

Did you see any evidence of a substantial change in its condition? A. Sir, as I recall, some work had been started but it was far from completion.

Q. Well, is your recollection about this matter a bit on the hazy side? A. Yes, that's right, because I didn't make any note.

MR. JACKSON: I would like to offer in evidence the paper, the
13 page of Mr. Crowell's book for January 3rd and also the page for July 9; do you have any objection?

MR. DOWDEY: Are these the ones clipped, Mr. Jackson?

(Mr. Jackson and Mr. Dowdey conferred briefly.)

MR. DOWDEY: I have no objection.

THE COURT: They will be admitted.

(January 3 page from Mr. Crowell's book received as Dfdt's 26; July 9 page received as Dfdt's 27.)

BY MR. JACKSON:

Q. Did you make any money out of these sales or have any interest in this property other than your right to a commission? A. No, I did not.

Q. And your business is what? What is your principal business? A. Manager.

Q. Speak up. A. Office manager of the Fidelity Investment Company.

Q. Do you know what connection, if any, Fidelity Investment Company has with the Perpetual Building Association? A. Yes, I do.

Q. What is it? A. The Board of Directors of the Perpetual Building Association are the partners in ownership of the Fidelity
14 Investment Company.

Q. Do you know of anything you did in respect of the foreclosure of this property which intentionally favored the Perpetual Building Association over any other person interested in this property? A. I do not.

MR. JACKSON: I'd like to offer these two pages, January -- just the January 3rd page, as Defendant's Exhibit Number 26th and the July 9 page as Defendant's Exhibit Number 27, and I understand the Court has already ruled that they may be admitted.

THE COURT: They are admitted without objection.

MR. JACKSON: And I pass them to the Court.

I have no further questions.

CROSS EXAMINATION

BY MR. DOWDEY:

Q. Mr. Crowell, when is your first recollection of having anything to do with this property, 1743 18th Street? A. When the advertisement was approved to be submitted to the auctioneer for publication.

Q. Do you know if there was any advertisement prior to the one for the sale January 3, 1958? A. I believe there was but I don't recall when.

Q. Would you normally have been consulted about that? A. Yes.

15 Q. Would you make any decision about postponing a sale?

A. I do if the circumstances warrant it, yes.

Q. Well, is the decision to postpone sales up to you or not?

A. Mr. Scrivener and myself.

Q. Well, do you have any recollection of having postponed this sale? A. The January 9th sale was not postponed.

Q. January 3. A. Three, I'm sorry; January 3 was not postponed.

Q. Had there been one scheduled prior to that that was postponed?

A. I don't recall whether or not an advertisement was inserted in the papers anytime prior to that. There may have been.

Q. Now, after the sale of January 3, did I understand you to say correctly that you, Mr. Scrivener, and Mr. Thomas made contact with the purchaser? A. With the successful bidder at that sale?

Q. Yes. A. Contact was made through correspondence as I recall.

Q. By whom? A. Mr. Thomas, I believe.

16 Q. You didn't write any letters, did you? A. I wrote -- I did not write them personally, no.

Q. And you didn't contact this individual personally, did you?
A. I did not.

Q. Except for attendance at the sale, on January 3, and July 9, 1958, did you ever have occasion to see the property at any other time?
A. I did not examine the property that I recall, on any other occasions.

Q. None that you recall? A. None that I recall.

Q. Do you recall ever receiving any information that this property was being vandalized? A. I don't believe I did.

Q. Do you recall after you had this successful bid at the January 3 sale that the date of settlement of that contract was extended?
A. I believe it was.

Q. Did you have anything to do with that? A. In the normal course of events, I would have. I don't recall the specific incident.

Q. You don't recall that? A. The specific incident, no.

17 Q. Do you recall participating in any discussions about forfeiting the deposit of a bidder on this property? A. The deposit, the successful bidder, yes, there was discussion of it.

Q. When and where? A. In the offices of Perpetual subsequent to the time that was granted under the extension.

Q. And who participated? A. Mr. Samuel Scrivener, Jr., Mr. Thomas, and myself.

Q. Was Mr. Baltz there? A. He was not present in the conference room which I participated.

Q. What was decided at that conference? A. It was decided that the trustees would reorder sale of the property by their advertisement and cause forfeiture of the deposit of the first sale.

Q. Was anything else decided at that conference? A. We went into the matter of what procedure might be desirable in so far as any rise of action concerning that successful bidder for their failure to meet the terms of the sale.

Q. And what decision was reached? A. Our decision was reached that the individual was in the state of Pennsylvania at the time and we

concluded that it would not be practical under the circumstances to attempt to enter into litigation in that state.

18 Q. Was anything else discussed? A. That was the question of specific performance -- we took the same -- made the same decision concerning any possible suit for damages also.

Q. Was there any discussion of vandalism of the property?

A. No, no.

Q. When did this conference take place? A. I don't recall anything in the diary on it.

Q. How soon after the first sale was it? A. It would be after the expiration of the extension of settlement.

Q. At that conference did you discuss the possible seizure of some money that Mr. Sheridan had at Perpetual? A. Are you referring to the insurance?

Q. Yes. A. Insurance item?

Q. Yes. A. I did not participate in that discussion.

Q. Did you decide at this conference that you are talking about about how the property would be sold the second time? A. Only with reference to what I mentioned earlier concerning this federal tax problem.

19 Q. Was this all the same conference? A. Yes.

Q. When you decided to forfeit deposit and not to sue the purchaser and to have another sale and to have the next sale without it being subject to the tax lien? A. Yes, we would guarantee title of record.

Q. And all this was the same conference? A. To the best of my knowledge.

Q. Did you ever have any communications with Mr. Sheridan?

A. I did not.

Q. Did you ever get any directions for communicating with him?

A. The only directions given were those in connection with the submission of the advertisement to be used in the first sale.

Q. Do you still act as a trustee in foreclosures for Perpetual?

A. That's correct.

* * * * *

REDIRECT EXAMINATION

BY MR. JACKSON:

Q. Mr. Crowell, in the advertisements of the Perpetual Building Association does the name of Mr. Samuel Scrivener appear as a member of the Borad of Directors? A. Repeat the question again.

Q. In the advertisements of the Perpetual Building Association, does the name of Mr. Samuel Scrivener appear as a member of the board of Directors? A. Yes, I have seen it.

Q. You have seen it? A. That's correct.

Q. Do you know the little circulars that Perpetual Building Association has of their statement of balance kept on the counters and so on? A. Yes.

Q. Does the name appear in those? A. That's right.

Q. In the newspaper advertisements, have you seen his name? A. I have seen his name; that's right.

MR. JACKSON: That's all.

MR. DOWDEY: I have another question.

21 RECROSS EXAMINATION

BY MR. DOWDEY:

Q. Does the connection of the ownership of Fidelity Investment Company, does that appear in public pronouncements by Fidelity Investment Company, who the owners of it are? A. We do not advertise.

Q. It is not advertised who the owners are? A. We do not advertise, period.

Q. Well, did you ever communicate to Mr. Sheridan that the owners of Fidelity Investment Company were the directors of Perpetual? A. Didn't communicate with Mr. Sheridan.

Q. Did you ever communicate to the public, in the newspaper, on Court record, or any other place, who the partners were in Fidelity Investment Company? A. Perhaps on one occasion when I was under oath as a witness.

Q. But not otherwise. A. Not otherwise.

Q. As a matter of fact, what is the business of Fidelity Investment Company? A. Realtors.

Q. You do an insurance business? A. That's correct.

22 Q. Do you place insurance for Perpetual Building Association? A. That's correct.

Q. And you earn a profit out of that; is that correct? A. (Nodding)

Q. Which inures to the partners who are directors of the Perpetual? A. Yes.

MR. DOWDEY: No further questions.

* * * * *

94 THE COURT: My feeling is that you are going to need more than either one of you asked for. (Referring to time requested by counsel for argument.)

You have got this question of marshalling assets here, have you not?

MR. JACKSON: Yes, I do. I think that you are probably right that I would take longer if we have any problems about that.

MR. DOWDEY: Well, I don't know what -- I don't know anything that would suggest a question about that. If Mr. Jackson has any authorities, I would like to look them over.

95 THE COURT: Well, you had a case in 59 Appeals and one in 60 Appeals. Have you given those to counsel?

MR. JACKSON: No, Your Honor, I haven't tried to apprise my opponent -- I told him of the principles and I have several cases on this.

THE COURT: Would you mind giving them to him. If he wants to distinguish them I would like to have him do it.

MR. JACKSON: Well, I wouldn't really want him to, but I would give him a reference to the cases that establish this principle and shall I give him them in open court or --

THE COURT: You can give them to him after we recess. I am sure we cannot finish arguing this case this afternoon and I do not want to interrupt it. I don't know what you gentlemen feel about it, but I do feel is a very complex case.

We shall therefore adjourn until 10:00 a.m., tomorrow morning and we will give each side 40 minutes to argue the case. If you have any other cases that you are going to rely on, except 59 and 60 and perhaps the Supreme Court case cited therein, I wish you would give them to my law clerk so we can do a little homework on it, too.

* * * * *

97 THE COURT: Let me ask you gentlemen this: Is there an exhibit in here that shows the agreement under which this insurance deposit was held?

MR. JACKSON: The exhibit, first exhibit that relates to that, of course, is the Deed of Trust and the second exhibit that relates to that is an exhibit, -- if I can have the exhibits -- it is a letter of instructions to the Realty Title Insurance Company, which contains reference to Gorlitz -- I think I can point out the one (examining exhibits).

You understand that I think I have to make a slight comment. This reliance of Perpetual Building Association is on the Deed of Trust. Now, when the fund was received, there was a letter of instructions to the Realty Title Insurance Company concerning it, which related, in effect, to what should be done with it when and if Mr. Sheridan ever became entitled to it.

Now let me see if I can find that exhibit.

MR. DOWDEY: I think my opponent is mistaken with respect to that. Let me say that this matter is covered by one of the findings of Judge Keech in the previous trial.

The check came in -- was in 1955. This purported assignment, which he refers to, is something in 1957 long afterward. I am trying to find this particular item.

98 THE COURT: Do you have a file down there, Mr. Jackson, on it?

MR. JACKSON: Yes, 17-C is the exhibit that I am referring to.

THE COURT: Let me see that, and I think you have got the Court file down there on the counsel table.

MR. JACKSON: Yes, and there is a reference there reminds me that there is a reference to this fund in the sales contract between Mr. -- let's see if that is in evidence -- I think it is in evidence -- between Mr. --

MR. DOWDEY: Between Mr. Sheridan and Mr. Hollander.

The chronology of the whole thing is right in Findings 4 and 5, all the agreements.

THE COURT: Four and five.

MR. DOWDEY: Four and five.

THE COURT: What does this Finding mean, "would be held by

Perpetual to be paid to the seller when appropriate"?

MR. DOWDEY: What number is that?

MR. JACKSON: Both sides agree, I think --

THE COURT: Five.

MR. JACKSON: I have that.

MR. DOWDEY: I couldn't answer that.

THE COURT: Well, essentially, then, is it that this thing is governed by the Deed of Trust?

99 MR. JACKSON: We contend it is, as far as Perpetual is concerned.

MR. DOWDEY: It is also governed, I think, by the way Perpetual treated the fund. We shall see in its disbursements set forth in Finding 7, that is what they did. They made these disbursements to Sheridan as work progressed.

THE COURT: Well, what was the theory of that, that as their equity in the property increased that they could afford to let Sheridan have so much money?

MR. DOWDEY: I think so. In other words, chances of a deficiency to the extent of $9,000 or so with diminish chance --

THE COURT: Well, then, that would seem to indicate that all along they were holding this as collateral for the note.

MR. DOWDEY: I would think so. Not collateral, they -- they had a lien on it. They held a lien on the check. There is no question about that.

THE COURT: Had a lien on it?

MR. DOWDEY: That's right. Now, they had no right to sell this collateral or anything like it, which is evidenced by the check itself, which says that it is payable to two people and the account is in the name of two people.

100 Now, in addition, I would say I am glad the Court called my attention to this.

THE COURT: Well, how could the funds be withdrawn? Was there a contract with them? There must have been, and, if so, where is that contract?

MR. DOWDEY: There is a deposit, just a deposit.

THE COURT: Wasn't there a book?

MR. DOWDEY: There was a book.

THE COURT: Is that an exhibit?

MR. DOWDEY: Oh, I know what, there is a stipulation in the record that Your Honor -- I see that now -- that Your Honor, perhaps, doesn't -- has not noticed. It is the basis for Finding No. 7. And it's probably near the end of the file, if the Court please, because it was submitted at the time of trial and it merely describes the account.

It's something -- maybe I can find it for you.

THE COURT: Well, that still doesn't say on whose signature it was. Was it either, or would it have to be by both?

MR. DOWDEY: It says, and Leo G. Sheridan and Perpetual Building Association as their interests may appear. The check was likewise payable -- we don't have the check in evidence, but the check was payable to their joint order likewise, and I might add, in connection with Finding 4, there has been evidence given in this case that the policy was

101 -- the policy of insurance was in Sheridan's name only, and that policy is not aviailable.

THE COURT: I seriously doubt that there was ever any policy in his name alone, if it was written by Fireman's Insurance at the instigation of Fidelity.

MR. DOWDEY: It would seem astounding if it were, wouldn't it?

THE COURT: Yes.

MR. JACKSON: Well, Fireman's Insurance Company wouldn't make that check payable to both of them.

THE COURT: No.

MR. DOWDEY: No.

MR. JACKSON: Certainly, agree with Mr. Dowdey that the property of this fund came into the hands of Perpetual. It came into the hands of Perpetual and statement of facts No. 5 tells that it was a contract between Hollander and Mr. Sheridan, and I agree with Mr. Dowdey

that Perpetual had the lien on it and --

MR. DOWDEY: Well, now, just a minute, Mr. Jackson. I want to make this very clear. You doubt that the policy didn't mention Perpetual's name but we are talking about the check. Now, the check, itself, -- this is Finding 4, and we had a check, presumably -- your clients had a check, when they agreed to this, that the check was payable,

102 and here's the words by the Fireman's Insurance Company, "Payable jointly to Plaintiff and Perpetual;" now that is in here. Now, if you expect to --

THE COURT: Well, it was deposited in an account in their joint names as their interest might appear.

MR. DOWDEY: Yes.

THE COURT: Yes. I think I understand the situation now.

All right. I will see you all tomorrow morning at ten o'clock.

* * * * *

[Filed January 22, 1963

1 Washington, D.C.
Tuesday, October 9, 1962

The above-entitled cause came on for further hearing before THE HONORABLE GEORGE R. HART, JR., United States District Judge, at 10:00 a.m.

* * * * *

2 THE COURT: Gentlemen, this Court finds that fiduciaries in this case had a conflicting interest as found by the Court of Appeals in the case of Sheridan v. Perpetual Building Association, et al., No. 16,167, decided February 1, 1962; and in making the following findings of fact, the Court follows the teaching of that case and the direction of that case that, according to the ancient principles, where there is a conflicting interest in the fiduciary that the principles of law require that the fiduciaries bear the burden of proving that they have been faithful to their trust. And with that preamble, the Court makes the following findings of facts.

I might say that these findings include the agreed findings as augmented by me with further matters that apparently developed at this trial and not at the other one; or at least findings were not made on some of the points in the previous trial.

* * * * *

12 Now, before I conclude, is there any finding, not inconsistent with the findings that I have made, that the plaintiff would like me to make?

MR. DOWDEY: Yes, Your Honor. If you would like, I will go over them with reference to the ones that you have already made.

With reference to Finding No. 2, I would like it shown that the partnership, Fidelity Investment Company, consists of all the directors of Perpetual.

THE COURT: Well, I have found "2" as you and Mr. Jackson stipulated it, and I did not change that except to add on the finding, with regard to Mr. Scrivener, that he was also a partner in Fidelity Investment Company, which you all had not stipulated before.

13 MR. DOWDEY: Yes. There was testimony, however, to the effect that all the directors of Perpetual are also partners in Fidelity Investment Company. And they are all the partners. The directors of Perpetual and Fidelity Investment Company are identical. The partners of Fidelity Investment Company --

THE COURT: There is no question about that. That is true. I think that the finding as it now is set forth indicates that. Certainly it is true.

MR. DOWDEY: I would request with respect to that that none of this information of their connection with Perpetual was disclosed to the plaintiff.

THE COURT: None of the connection with Fidelity? I don't think that is pertinent to this case.

MR. DOWDEY: It may not be pertinent under Your Honor's ruling, but that was the testimony here.

THE COURT: What I have asked: Do you request any additional

findings that would be pertinent to and not inconsistent with my rulings. I am not going to change the rulings I made. I may have overlooked something on one side or the other that I should make a finding on.

MR. DOWDEY: Let me go on. I requested a finding on the non-disclosure by these people of their connection with Perpetual. In connection with finding No. 4, or -- I am sorry, was Your Honor going to

14 speak?

THE COURT: What I was going to say is, there is no indication here that the trustees or Perpetual advised the plaintiff of the connection between them. On the other hand, the plaintiff has not taken the stand. And whether or not he had the common knowledge that I think anybody else in the business around town has that they are connected, I don't know.

MR. DOWDEY: Let me say this, if I may recall the testimony to Your Honor: that although it may be common knowledge with respect to Samuel Scrivener, Jr.'s connection with Perpetual, it is not common knowledge that Fidelity Investment Company is a partnership of the directors of Perpetual. And if Your Honor may recall, the testimony elicited from Mr. Crowell demonstrated that the only time he had ever made a disclosure of this fact was on the witness stand. This is not public knowledge, and I think it is not public knowledge for a very good reason; because, I say, there is a matter of perhaps making a secret profit, in their dealings with Perpetual.

THE COURT: I will add to Finding 2 that neither the trustees nor Perpetual -- What I am trying to say is they didn't positively tell them that there was a connection or advise them there was a connection, without in any way indicating that the plaintiff didn't in fact know it. Because I don't know whether he knew it or not. He didn't get on the stand

15 and say he did.

I will add this finding: That neither the trustees nor Perpetual formally advised the plaintiff of the connection between the trustees and Perpetual.

MR. JACKSON: Will Your Honor please add following that the words: But the plaintiff did not testify and the Court does not know as a fact in this case whether he knew or was charged with circumstances of facts from which he could have known.

THE COURT: No, but I will add this:

The plaintiff did not testify in this case and the Court does not know whether plaintiff in fact knew of the connection or not.

MR. DOWDEY: With respect to finding number 4, I would like additional finding of fact policy of insurance spoken of there was written through Fidelity Investment Company as agent; and that it was in Sheridan's name.

MR. JACKSON: I object to that on the grounds it is fully irrelevant.

THE COURT: Go ahead.

MR. DOWDEY: And that it was in Sheridan's name only.

THE COURT: You haven't shown me any indication whatever that it was in Sheridan's name only.

MR. DOWDEY: Testimony of Mr. Thomas was to that effect, Your
16 Honor, and the policy, as I say, is in the hands of Fidelity, an agent of Perpetual.

THE COURT: Well, in any event it is certainly admitted that the check was made out to both parties, wasn't it?

MR. DOWDEY: That is correct, Your Honor. But the request I am making -- and I have no quarrel with your finding number 4, if the Court please. It is a finding I agreed to before the trial began. But I would like this additional fact shown: that this policy was written through Fidelity and that, so far as this evidence here shows, it was in Sheridan's name only.

THE COURT: I will add to the end of that: This policy was written through Fidelity Investment Company. Period.

Is there anything else?

MR. DOWDEY: If Your Honor will indulge me a moment. I have a note here I am trying to read.

With respect to Finding No. 6, I would request that finding to show that after receiving notice that Schnitzer had assumed the obligation of Sheridan, that the records of Perpetual Building Association were changed to show that the principal obligor was Schnitzer.

THE COURT: I don't mind adding to that that the Title and Insurance Company notified Perpetual of the assumption. I don't believe it is necessary, however. You have got an exhibit in there which shows it.

17 MR. DOWDEY: Your Honor, Finding No. 6 already discloses that the Title Company notified --

THE COURT: Oh, yes. They received it. That is as far as I will go.

MR. DOWDEY: There are exhibits in there that would show that they noted the change on the records.

THE COURT: That didn't note the change of the principal obligor.

MR. DOWDEY: I will change that word, since "principal obligor" would have a legal connotation, that their records were changed to show --

THE COURT: As long as they had notice, what difference does it make what their records show?

MR. DOWDEY: The records would be important to notice whether or not they thereafter dealt with Schnitzer as a principal instead of Sheridan.

THE COURT: I won't make that finding; because I don't believe it is necessary, or would add anything to the case.

Anything further?

MR. DOWDEY: If Your Honor will indulge me a moment.

With respect to Finding 8, I would request the Court to also find that the serious delinquencies there mentioned and the vandalism noted

18 by the Court in that finding were observed in April of 1957 by representatives of Perpetual; and that several notices of foreclosures were given after that date, but no foreclosure sale was had until January 3, 1958.

THE COURT: I don't recall any advertisement of foreclosure

before that date. Was there?

MR. DOWDEY: Yes, Your Honor.

MR. JACKSON: If it please the Court, in the first place I would very seriously object to that. There is not the slightest indication in here of whether Mr. Sheridan had observed the vandalism. He hasn't testified. I think it is quite unfair to ask for findings which are dependent upon observations of --

THE COURT: I am not going to make that finding.

But were there previously advertised sales prior to the --

MR. DOWDEY: There was no sale but advertisements were sent out, Your Honor.

THE COURT: Were they published?

MR. DOWDEY: They were not published. But notices of sale were sent out. They were not advertised. Time and time again --

THE COURT: And then they would come in and pay some money, wouldn't they?

MR. DOWDEY: That is right, Your Honor.

19 THE COURT: I am not going to put it in there.

Is there anything else?

MR. DOWDEY: May I correct myself on that: and then they would come in and pay some money. That was not true in all cases. Certainly not true in the last few that were sent out. They didn't pay any money.

THE COURT: Well, the record will speak for itself on that.

Is there anything else?

MR. DOWDEY: Yes, Your Honor. I have several other things here.

I would request, in connection with -- Perhaps I had better not identify this in connection with any single finding that has been made. But I would request that no notice of any information in possession of trustees or of Perpetual was given to Mr. Sheridan at any time other than formal notices of foreclosure.

THE COURT: I won't make that finding. I will make a finding --

wait a minute. What was Thomas's testimony as to his conversations with Sheridan in the Perpetual?

MR. JACKSON: The testimony was in effect that Sheridan came in, talked to him about this fund, and as I recall it, as near as I can recall, he discussed it with Mr. Thomas and Mr. Thomas told him that he ran the risk of losing the money in the fund. Now, to all that I want to make this objection: I do not think it is proper to ask the Court to

20 make findings of negative matters. That is, if there is nothing in the evidence about it, the Court doesn't ordinarily make --

THE COURT: I can find a negative matter of something they didn't do if it goes to the extent that the evidence shows. But he is asking for a general finding they never did anything except those formal notices required, and I can't make such a finding. I don't know whether it is true or not. I don't think it is.

MR. DOWDEY: That is the testimony.

THE COURT: There was testimony by Mr. Thomas that the plaintiff was in his office and they discussed various matters.

MR. DOWDEY: Just a minute, Your Honor. Let me see if I can refresh your recollection. To begin with --

THE COURT: You can refresh it if you wish to order the testimony and show me what Mr. Thomas said, and perhaps we can make some finding after I have his testimony before me and remember it in detail.

MR. DOWDEY: Very well, Your Honor.

Let me say this, in connection with that: I think that Your Honor is probably familiar with the fact that Mr. Crowell and Mr. Scrivener stated that they had no communications whatsoever with Mr. Sheridan and the only directions for communicating with Mr. Sheridan they ever

21 gave or understood were given were the formal notices of the sale.

THE COURT: That is what they said. But remember that the Court of Appeals has in effect said these people are all one. They all now have got these fiduciary duties to your client. If one of them carries them out, I assume they all have.

MR. DOWDEY: I wouldn't agree with that. But in any event I am just inquiring to see if the only testimony the Court would require on that would be the testimony of Mr. Thomas. That is the only purpose of my inquiry, because I don't want to write up something that would not be necessary.

THE COURT: Well, what I will find will depend on exactly what he said.

MR. DOWDEY: Yes, Your Honor.

THE COURT: Is there anything further?

MR. DOWDEY: I would request the Court to find that Mr. Sheridan was at the first sale but not at the second.

THE COURT: I will include a finding that he received notice of both sales; that he attended the first sale, did not attend the second sale.

MR. DOWDEY: That is correct. I agree with that.

MR. JACKSON: In connection with that statement, Your Honor is aware, I take it, that the evidence was that Mr. Bartow, his attorney, was there.

* * * * *

23 MR. DOWDEY: * * *

Your Honor, in making these proposals, I simply brought up subjects that I thought were relevant and which the Court's findings have not covered. And I do not necessarily agree that the other findings are properly made.

THE COURT: I, of course, understand that the only findings you agree were properly made were those which were actually stipulated to; that you take exception, I assume, to all of the other findings.

MR. DOWDEY: Yes, Your Honor. I just wanted to make that clear, in proposing these, that I don't necessarily agree with the others.

THE COURT: Fine. I am sure you don't.

MR. DOWDEY: I can think of no other subject right now.

THE COURT: Mr. Jackson, do you have anything further?

MR. JACKSON: No, sir.

THE COURT: Mr. Jackson, would you prepare these findings as I dictated them and as I said I would modify them. Prepare an order. Serve copies on the other side.

If you still wish this thing modified about the notice, you may, after you receive Mr. Jackson's draft as to the findings and conclusions as I have dictated them, request an additional finding and back it up with the evidence of Mr. Thomas that we may have.

I frankly cannot remember in detail all of his testimony.

* * * * *

PLAINTIFF'S #11

REPORT OF CONDITION

Series #133-8538 - Date - 7/26/57

Name: Shirley H. Schnitzer
1743 - 18th, N.W.

Present Bal. = 11,492 - Arrears 6 mos.

Appraisers Report:

7/29/57 - Prop in same condition as reported 4/17/57.
Recommend foreclosure to prevent further vandalism.
[Signature]

[Filed January 21, 1963]

PLAINTIFF'S EXHIBIT NO. 1

Mr. Jules Fink
Attorney at Law
2026 "I" Street, N. W.
Washington 6, D.C.

Dear Mr. Fink:

In accordance with your request for an appraisal of the value of the property commonly known as

1743 18th Street, N.W.
Washington, D. C.

and legally designated as,

Lot 21 in Square 153 in the
District of Columbia

I, herewith, submit this report which was drawn from the information rendered me through the "market data approach".

I, hereby, certify that I have inspected the property and that all data gathered in my investigation is from a source believed to be reliable.

In my opinion, as of December 18, 1957, the value in fee simple for a fair market price for the property described above is —

Sixteen Thousand Dollars ----------($16,000.)

(Subject to the completion of the outlined repairs as attached and the release of all liens.)

Very truly yours,

Edward H. Ehrlich

EHE:fz
Enc.

[Attached to Plaintiff's Exhibit No. 1]

1743 18th Street, N. W.

Lot 121 Square 153

Improvements Required to Interior

First Floor:	Paper and paint* three rooms and large entrance foyer, sand and finish floors
Second Floor:	Paper and Paint three rooms, bath and hall, sand and finish floors, plaster where necessary
Third Floor:	Paper and paint three rooms, bath and hall, sand and finish floors, plaster where necessary
Stairway:	Paper and paint, sand and finish stairs, plaster where necessary
Basement:	Paper and paint three rooms, kitchen, bath and hall, install new floor-tile
Kitchens:	Install two stoves, two refrigerators, two sinks, two sets of cabinets
Baths:	Install three commodes, three sinks, three bathtubs, tile floor and walls
Electrical Repairs:	Install new fixtures-- basement, second floor and third floor. Remove defective wiring, check all switches This installation will require approximately twenty fixtures
Heating System:	The heating plant and system are in disrepair. It is impossible to render a recommendation without the advice of a plumbing contractor.

*Paper walls, paint (or finish) woodwork

Comments:

1. Property over assessed
2. This report is not complete due to the insufficient time allotted to gather necessary information.

[Filed January 21, 1963]

PLAINTIFF'S EXHIBIT NO. 2

January 7, 1958

Mr. Jules Fink, Esquire
2026 Eye Street, N. W.
Washington 6, D. C.

Re: Lot 121, Square 153
Add: 1743 18th St., N. W.

Dear Mr. Fink:

As per your request to Appraise the above captioned property, in the District of Columbia, in it's present condition at today's market value, I hereby submit my qualifications, and conclusions regarding said property.

I, William M. Dora, a duly licensed real estate broker in the District of Columbia, have been actively engaged in the real estate business in the said District for Seven (7) years, and am familiar with the value of real estate in the neighborhood of 1743 18th Street, N.W.; I have viewed said property, the same being a brick three story house in a dilapitated condition, for the purpose of estimating the present fair market value of the same; in my opinion the fair market value of the said property is Fifteen Thousand Eight Hundred Dollars ($15,800.00).

In the event a more detailed report should be desired, I would be delighted to oblige.

Very truly yours,

/s/ William M. Dora
William M. Dora, Broker

[Filed January 21, 1963]

PLAINTIFF'S EXHIBIT NO. 4

January 9, 1958

Mr. Jules Fink, Esquire
2026 Eye Street, N.W.
Washington 6, D. C.

Re: Lot 121, Square 153
Add: 1743 18th Street, N.W.

Dear Mr. Fink:

Since there seems to be some confusion on your part, with regards to the appraisal I made on the above captioned property on January 7, 1958 for you, I should like to clarify the same.

My appraised valuation on said property was predicated on the assumption that the owners were to put the property in a livable condition. However in the event it is to be purchased in it's As-Is condition, I would not advise the purchase price to exceed $11,500.00, because I feel that a minimum of $4,300.00 would be required to make the property livable. Actually in its present condition, I question if it is even saleable at all.

Also I might add, the property was assessed by the Assessor's office for the District of Columbia for purposes of taxation at $10,080 for the improvements, and $3,768 for the ground, making a total of $13,848, in the year of 1948, which was prior to the fire which nearly demolished the improvements. Therefore, I hope that you will understand a little more clearly, that my appraisal previously given you in the amount of $15,800, was the amount of market value the property would have, after repairs are made and release of mechanic's liens furnished.

Should you require more detailed information, please do not hesitate to call me.

Very respectfully yours,
/s/ William M. Dora

[Filed January 21, 1963]

PLAINTIFF'S EXHIBIT NO. 6

January 23, 1958

Mr. Jules Fink
Attorney at Law
2026 I Street, N. W.
Washington 6, D. C.

Re: 1743 18th Street, N.W.

Dear Mr. Fink:

Pursuant to your request for an appraisal of the fair market value in fee simple of the above captioned property in its as is condition, I herewith submit my appraisal of —

Twelve Thousand Dollars ----------($12,000.)

Very truly yours,
Edward H. Ehrlich

EHE:fz

[Filed January 22, 1963]

DEFENDANT'S EXHIBIT NO. 17-C

February 28, 1957

Realty Title Insurance Company, Inc.
1424 "K" Street, N. W.
Washington, D. C.

Attention: Mr. Thomas W. Hunt

Dear Mr. Hunt:

Please be informed that as a result of a fire loss which occurred to premises 1743 - 18th Street, N. W., Washington, D C., a check in the sum of $9,713.41 dated April 26, 1955 was made payable to Perpetual Building Association and Leo G. Sheridan jointly by Firemen's Insurance Company.

That as soon as said premises have been restored said check will be released to your company.

Defendant's Exhibit No. 17-C (Continued)

You are further instructed that when said check has cleared the bank, that you are to pay over to Samuel J. Gorlitz the sum of $3,655.63 plus interest at 6% per annum from March 1, 1957 to date of payment and turn the balance over to the undersigned, Leo G. Sheridan.

You are further instructed that any changes in the aforesaid instructions are to be countersigned by Leo G. Sheridan and Samuel J. Gorlitz.

You are further instructed to deduct your charges in the sum of $20.00 for services rendered in this matter.

Please be advised that these instructions are irrevocable.

/s/ L. G. Sheridan
Leo C. Sheridan

Copy to: Perpetual Building Association

Noted by Perpetual Building Association

[Filed January 22, 1963]

DEFENDANT'S EXHIBIT NO. 20

May 9, 1958

District Director of Internal Revenue
Morton Building
28 Hopkins Place
Baltimore 1, Maryland
Attn: Chief, Special Procedures Section.

Dear Sir:

Comes now Ernest A. Thomas of Perpetual Building Association, 500 Eleventh Street, N.W., Washington, D.C., and applies to have the following property discharged under Section 6325 (b) (2) (B) of the

Defendant's Exhibit No. 20 (Continued)

Internal Revenue Code of 1954 from Federal tax lien outstanding against 1823-1825 Jefferson Place, N.W., Company, a corporation, of Washington, D. C.

(1) The property with respect to which the discharge is desired is described as follows:

> Lot numbered One Hundred and Twenty-one (121) in J. F. Manning's subdivision of lots in Square numbered One Hundred and Fifty-three (153), as per plat recorded in the Office of the Surveyor for the District of Columbia in Liber 20 at folio 160, improved by premises 1743 Eighteenth Street, N.W.

(2) The discharge is sought in order to permit the property to be sold at foreclosure sale, free and clear of the Federal lien and right of redemption.

(3) The outstanding Federal tax lien against the taxpayer, which encumbrances the property sought to be discharged, is identified as United States tax lien 1902-57, recorded October 9, 1957, in the Office of the Clerk of the United States District Court for the District of Columbia, in the amount of $4,045.36 and is for additional corporation taxes.

(4) The recorded liens or encumbrances affecting the property and which are believed to be prior to the Federal tax lien are as follows:

(a) First deed of trust.
(b) Executed December 2, 1952.
(c) Recorded December 3, 1952.
(d) Recorded in the land records of the District of Columbia instrument #47491.
(e) Original amount was $13,500.00
(f) Balance of principal and interest to May 31, 1958, is $12,285.11.
(g) Other costs and accrued interest is $1.67 per day (daily interest rate).
(h) Total amount due is $12,285.11.
(i) No relationship.

(As reported by attorney for second trust holder)

(a) Second deed of trust.
(b) Executed February 27, 1957.

[Def't's Ex. 20 continued]

(c) Recorded April 9, 1957.
(d) Recorded in the land records of the District of Columbia, Liber 10832, Folio 86.
(e) Original amount was $5,500.00 @ 6%, due February 27, 1958, no payments made.
(i) Relationship unknown.

(5) Information requested under this item is unknown.

(6) Advertising charges were approximately $85.00. Auctioneer's fee is one and one-half percent of the sale price up to $10,000.00 and three-eighths of one percent for amount over $10,000.00. Trustee fee is five percent of the sale price.

(7) (a) Applicant's valuation is $13,000.00. The appraisal of Thornton W. Owen is attached.

(b) Appraisals of Chas. C. Koones and Frank J. Luchs are attached.

(8) On January 3, 1958, this property was foreclosed under the first deed of trust and an announcement was made at the foreclosure sale that the purchaser would be required to pay a Federal tax lien. The property was sold to Kenneth S. and Ann M. DuMond for $12,050.00. Although there were approximately twenty people at the sale, there was no bid other than the DuMond bid. After the foreclosure sale, Colonel DuMond attempted to secure a discharge of the Federal tax lien but was unsuccessful and subsequently forfeited his deposit of $500.00.

"I declare under the penalties of perjury that this application (including any accompanying schedules, exhibits, affidavits, and statements) has been examined by me and to the best of my knowledge and belief is true, correct, and complete."

Ernest A. Thomas, Treasurer
Perpetual Building Association

ATTACHMENT (1) TO DEFENDANT'S EXHIBIT NO. 20

To: Perpetual Building Association

From: Thornton W. Owen, M.A.I.

Address. 1743 Eighteenth Street, N.W.

Legal Description. This property is known as Lot 121 in Square 153.

Lot Size. The property has a frontage of 52.63 feet on Eighteenth Street by 23 feet along Riggs Place, running back along the east line, at right angles to Riggs Place, 44 feet; thence easterly 5.25 feet; thence northerly 8.6 feet, and thence westerly 28.25 feet to Eighteenth Street, and contains 1,256 square feet of ground, more or less.

Location. This property, at the northeasterly corner of Eighteenth Street and Riggs Place, is in an area formerly occupied for large residential purposes, now largely converted to tenements and rooming house use, and occupied generally by Colored, with resulting declining values in the surrounding neighborhood.

Improvements. The improvements consist of a three story and basement corner brick building having stone trim on the first floor. On the first floor there is an entrance hall, living room and dining room, both with fireplaces, and space for a kitchen for which the plumbing has been roughed in.

On the second floor there is one room with a fireplace, as well as two other bedrooms and space for a bath, the plumbing for which has been roughed in. On the third floor there are three bedrooms and space for a bath, the plumbing for which has been roughed in. The flooring on the first and second floors is parquet, while on the third floor it is strip oak. The building is equipped with an outside fire escape.

In the basement there are two rooms having asphalt tile flooring, space for a bath for which the plumbing has been roughed in, and a large room in which plumbing for a kitchen has been roughed in. Adjacent to this room is space for a bath for which plumbing has been

roughed in. The flooring in one of the rooms is wood, while in the other it is broken asphalt tile. Also in the basement is an oil fired steam heating plant, not in working order.

Remodeling work has been undertaken, in this property, with the result that there are no plumbing fixtures in any of the baths or kitchens, only the rough plumbing having been installed. The building is in need of a new heating plant and radiation (the present type of radiators being obsolete), refinishing of the floors, completion of the inside trim, completion of the scraping of the walls, papering and painting both inside and outside.

In my opinion, in order to put this property in condition to be occupied, it would be necessary to complete the following work:

New oil burner and radiation	$2,000.00
Complete 4 baths @ $1,000.00 Each	4,000.00
Complete kitchens	1,500.00
Refinish floors	600.00
Complete trim (Carpentry)	250.00
Miscellaneous electrical work	150.00
Redecorating (paper and paint)	1,500.00
Total	$10,000.00

Comparative Data. For your information I quote the following sales:

(1) 1731 Riggs Place, N.W., was sold in 1951 for $19,000.00

(2) 1737 Riggs Place, N.W., was sold in 1953 for $21,000.00 and has since been listed for sale by Thomas W. Sandoz & Company for $17,500.00. They have been unable to dispose of the property. One of the purchasers in the 1953 sale has since purchased the interest of the other and is now remodeling the property into apartments.

(3) 1745 Eighteenth Street, N.W., was sold in June 1949 for $9,500.00, subject to the balance of a first trust placed by Columbia Federal Savings & Loan Association, in February 1946, in the original amount of $11,000.00.

(4) 1747 Eighteenth Street was sold in 1951 for $12,000.00 ($4,000.00 cash - $8,000.00 second trust) subject to a prior first trust in the amount of $12,000.00.

[Attachment (1) to Defendant's Exhibit No. 20, continued]

Determination of Value. It is my opinion that the subject property, which contains 40,000 cubic feet, would have a reproduction cost, after allowing for depreciation and obsolescence, of 50 cents per cubic foot, or $20,000.00. As previously mentioned, it would cost approximately $10,000.00 to complete the renovation of this property, resulting in a value for the improvements, in their present condition, of $10,000.00.

The ground, in my opinion, is worth $2.50 per square foot, or in round figures, $3,000.00, resulting in a value estimate of $13,000.00, "As Is".

Final Value. In my opinion, taking into consideration the sales of property in the area, the condition of the subject property, and the trends of the neighborhood, the fair market value of this property, on the market for all cash, would be:

THIRTEEN THOUSAND ($13,000.00) DOLLARS.

Trusting this is the information you desire, I am,

Very truly yours,

/s/ Thornton W. Owen, M.A.I.

TWO/f

ATTACHMENT (2) TO DEFENDANT'S EXHIBIT NO. 20

Koones & Montgomery
Realtors
Washington, D.C.

April 23, 1958

Perpetual Building Association
11th and E Streets, N.W.
Washington 4, D.C

Attention: Mr. Thornton W. Owen

Gentlemen:

In accordance with your request, I have made an examination and appraisal of the premises located at 1743 Eighteenth Street, N.W., and

[Attachment (2) to Defendant's Exhibit No. 20, continued]

wish to report as follows:

Location: The property is situated in middle Northwest Washington in an old residential neighborhood composed chiefly of three story brick row residences most of which are inhabited by a lower income group.

Land: Square 153, Lot 121

52.63' on Eighteenth Street
23.00' on Riggs Place
28.25' north line

Area - 1,256 square feet.

Zoning: Residential.

Assessed Value:

Land - Rate $3.00	$3,678
Improvements	10,080
	$13,848.

Improvements: The site is improved with a three story and finished basement brick corner residence. The structure contains twelve rooms, three baths, has an oil fired hot water heating plant in poor condition and old style radiators.

The structure is in the process of being remodelled and most of the plastering and trim work has been finished. The floors are in poor condition and will need sanding and replacing in part. The bath fixtures are not in.

The basement is 50% out of the ground and has three rooms which are usable. There is a metal fire escape on the Eighteenth Street side.

Valuation: There are no recent comparable sales in the area, however, $7,000 or $8,000 will have to be expended to complete the remodelling. It is my opinion that the property has the following value:

Improvements - Depreciated Value	$10,500
Lot	3,500
	$14,000.

Respectfully submitted,

/s/ Chas. C. Koones, M.A.I.

CCK:crr

[Attachment (2) to Defendant's Exhibit No. 20, continued]

Qualifications - Chas. C. Koones
Southern Building
Washington, D.C.

Engaged in the real estate business in Washington and nearby Maryland and Virginia for the past thirty years.

President of Koones & Montgomery, Incorporated, who operate a general real estate business including sales, rental management and who are Loan Correspondent for the State Mutual Life Assurance Company of Worcester, Massachusetts.

Member of the Washington Real Estate Board - President during the year 1941-42 and a Director from 1938 to 1944. Chairman, Washington Real Estate Board's Appraisal Committee for years 1946-47. At present time Director of the National Association of Real Estate Boards.

Me mber of the National Institute of Real Estate Brokers and a former member of the Board of Governors.

Member of the American Institute of Real Estate Appraisers of the National Association of Real Estate Boards - President, D. C. Chapter, term 1947-48. Member of the National Institute of Real Estate Counselors.

Developer and Sales Agent for the New York Avenue Industrial and Commercial Area where many well known local and national firms have erected warehouses and industrial buildings during the past fifteen years.

Has made appraisals for various attorneys, individuals and estates in connection with inheritance tax, estate tax and income tax and has testified in connection with various condemnation cases; has appeared before the Tax Court of the United States and has been appointed by the District of Columbia Supreme Court in many estate appraisals.

Have done consulting work, including market analysis, for a num-

[Attachment (2) to Defendant's Exhibit No. 20 continued]

ber of firms in the Metropolitan Area of Washington, including Raleigh Haberdasher, Government Employees Insurance Company and the Redevelopment Land Agency, in connection with the redevelopment of Southwest Washington.

Makes appraisals for the following:

American Security and Trust Co.
Capital Transit Company (rate case)
Department of Justice
District of Columbia
Equitable Life Assurance Society
Home Life Insurance Company
Guaranty Trust Co. of New York
Hot Shoppes
Melpar, Inc.
National Capital Housing Authority
National Capital Park & Planning Commission
National Housing Administration
National Metropolitan Bank
National Savings & Trust Co.
Peoples Drug Stores
Potomac Electric Power Co. (Rate Case)
Redevelopment Land Agency
Riggs National Bank
State Mutual Life Assurance Co.
Washington Properties

Some large assignments:

Office Buildings

Cafritz Building
Shoreham Building
National Press Building
Wire Building
Wyatt Building
Stoneleigh Court
Vermont Avenue and K Street
LaSalle Building
Colorado Building
Maiatico Building
Washington Building

Hotels

Sheraton Park
Sheraton Carlton
Mayflower
Roger Smith
Westchester
Statler

Miscellaneous

Union Market Terminal
Senate and House Office Building Sites

[Attachment (2) to Defendant's Exhibit No. 20 continued]

Malcolm Gibbs Estate
Chas. B. Hawley Estate
Kenilworth Avenue Widening (108 Properties)

ATTACHMENT (3) TO DEFENDANT'S EXHIBIT NO. 20

REPORT OF APPRAISER

District of Columbia, ss:

FRANK J. LUCHS, being first duly sworn on oath deposes and says, That he is one of the appraisers appointed to appraise the property described herein; That he has been engaged in the real estate business for more than twenty-five (25) years in the District of Columbia; That he is familiar with and acquainted with the value of property in the vicinity of 1743 Eighteenth Street, N.W., in the city of Washington, D.C , being Lot 121 in Square 153, improved with a three story and English basement corner dwelling of brick and precast concrete block; (more detailed description on sheet attached) That he has personally inspected said property; That he is of the opinion that said property is of the present market value of $13,500.00; That his appraisement of said property is $13,500.00; and That he has no interest, present or contemplated, in said property.

/s/ Frank J. Luchs, M.A.I.

[Jurat dated April 25, 1958]

1743 Eighteenth Street, N.W.
Washington, D. C.

Lot 121, Square 153

The subject property is a three story and English basement corner dwelling of brick and precast concrete block containing the following: - in the English basement, three rooms, kitchen and bath, also boiler; first floor, three rooms, kitchen, and bath; second floor, three

[Attachment (3) to Defendant's Exhibit No. 20 continued]

rooms and bath; and third floor, three rooms and bath.

The basement has an outside entrance to the sidewalk in the front and to the alley in the rear. There is no equipment in either the baths or the kitchens. There is an oil fired heating plant, American Jacket furnace. No burner is installed.

The property has been damaged by fire and is in a state of partial repair.

The lot contains 1,256 square feet and the building contains approximately 49,000 cubic feet.

DEFENDANT'S EXHIBIT 21

U.S. Treasury Department
Internal Revenue Service
District Director

Morton Building
28 Hopkins Place
Baltimore 1, Maryland

July 8, 1958

Mr. Ernest A. Thomas, Treasurer
Perpetual Building Association
Eleventh and E Streets, N.W.
Washington, D. C.

Re: Application for Discharge of Property

Taxpayers: 1823-25 Jefferson Pl. N.W. Corp.
1825 Jefferson Place, N.W.
Washington, D. C.

Property: 1743 Eighteenth Street, N.W.
Washington, D. C.

Dear Sir:

After conducting the usual investigation on your application for discharge of property from Federal tax lien, it has been determined that the Government has sufficient interest in the property sought to be discharged to satisfy our tax liens, and therefore the application must be

[Defendant's Exhibit No. 21 continued]

rejected.

It is suggested that you contact the local office of this district, 1011 Internal Revenue Bldg., Washington 25, D.C. for further discussion of this matter.

Very truly yours,

/s/ Irving Machiz
Acting District Director

cls/ces

PLAINTIFF'S #12

REPORT OF CONDITION

Series #133-8538 Date 12/12/57

Bal. 11,110.39 Arrears 5 months

Appraiser's Report:

12/13/57 - Renovation of this prop. has been at a standstill since prior to April '57.

Notice of Mechanics lien v. Lloyd Hollander, Pres. of defending corp. owners and the subject property in the amount of $1448.53 together with interest was tacked on the front door under date of 10/17/57.

/s/ R. W. Kidwell

[Filed November 16, 1962]

LEO G. SHERIDAN,
Plaintiff

vs.

PERPETUAL BUILDING ASSOCIATION ET AL
Defendants

Civil Action No. 619-59

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

This cause having come on for trial before the Court, without a jury, and the same having been fully heard upon the testimony and evidence adduced by the parties and full argument of counsel thereon, the Court hereby makes the following

Findings of Fact

1. That the parties hereto, by their counsel, stipulated that the matters and things set forth in Paragraphs 1 through 12 of the Findings

of Fact filed herein the 16th day of November, 1960, are true and accordingly may be taken and read herein as if set forth in full in these Findings of Fact; and any matters hereinafter set forth in the further findings of the Court shall be deemed to augment and not to modify or amend said earlier Findings of Fact.

2. On December 2, 1952, the plaintiff borrowed Thirteen Thousand Five Hundred Dollars ($13,500.00) from Perpetual Building Association (hereinafter referred to as Perpetual), repayment of the loan being secured by deed of trust of realty then owned by plaintiff, being Lot 121 in Square 153 in the District of Columbia, improved by the premises 1743 Eighteenth Street, N. W., Washington, D.C. Plaintiff executed a promissory note for Thirteen Thousand Five Hundred Dollars ($13,500.00) payable to the order of the Treasurer of Perpetual.

3. The defendants, Samuel Scrivener, Jr., and Junior F. Crowell, were named as trustees in the deed of trust. Samuel Scrivener, Jr. is an officer and director of Perpetual, and is a partner in Fidelity Investment Company. Junior F. Crowell manages Fidelity Investment Company, a partnership, the members of which are members of the Board of Directors of Perpetual. Neither the trustees nor Perpetual formally advised the plaintiff of the connection between the trustees and Perpetual. However, the plaintiff did not testify in this case, and the Court does not know whether plaintiff in fact knew of the connection or not, there being evidence that Scrivener's position on the Board of Directors of Perpetual is regularly published by Perpetual and is well known in the business community.

4. The deed of trust was in the usual form permitting the grantor to retain possession and enjoyment "until default be made in the repayment of said loan and additional amounts" in the manner therein prescribed, but "upon such default" the trustees were given the power, at the request of the Board of Directors of Perpetual, "to sell said realty or any part thereof at public auction, in such manner, at such time and place, upon such terms and conditions, and upon such public notice as the said trustees, or their survivor or survivors, may deem best for

the interests of all concerned * * *". The trustees were given the further power "upon full compliance with the terms and conditions of sale" to convey a fee simple title to the purchaser, and out of the proceeds of sale to pay all expenses thereof, including an auctioneer's fee and a trustee's commission of five percent (5%), the whole amount due Perpetual, and then any surplus to the grantor or his assigns. Among the covenants contained in the deed of trust were the following:

> "(4) That all buildings, improvements or fixtures forming part of said realty shall be in substantially the same condition as that which they had at the date of this deed of trust * * *."
>
> ---
>
> " * * * and the Treasurer may require such grantor to make any repairs, improvements or changes necessary to maintain said realty in the aforesaid described condition * * * ."
>
> ---
>
> "(5) That the improvements forming part of said realty shall be insured to the satisfaction of the Treasurer, who shall have the right to designate the insurer and to apply the proceeds of such insurance, including any premium rebate, to any deficiency in repayment to the Treasurer of any loan, additional amount or advance secured by this deed of trust."
>
> ---
>
> "(11) That if there shall be any default in the performance of any of the foregoing covenants the Treasurer shall have the right and power to do any one or more of the following: (a) Do any act or make any disbursements, in his name or the name of the grantor, which he may deem necessary or proper to protect the lien of this deed of trust."

5. In February 1955 the improvements on said realty were partially destroyed by fire, and on April 26, 1955 a check for Nine Thousand Seven Hundred Thirteen Dollars and Forty-one cents ($9,713.41) for the fire damage was issued by the Firemen's Insurance Company payable jointly

to plaintiff and Perpetual, which check was deposited in Account No. 134-1553 in Perpetual on April 5, 1957 in the names of "Leo G. Sheridan and Perpetual Building Association, as their interests may appear." The policy of fire insurance was written through Fidelity Investment Company.

6. In June 1955, subsequent to the fire and before any repair of the fire damage, plaintiff entered into a contract for sale of the property in its unrepaired condition to one H. Lloyd Hollander for Twelve Thousand Nine Hundred Fifty Dollars ($12,950.00). It was provided that the contract and sale of the property would not effect the right of the seller to the proceeds of the insurance and that the check would be held by Perpetual to be paid to the seller when appropriate. The purchaser had the option to remodel the premises prior to settlement at his expense. The purchaser agreed to assume the indebtedness to Perpetual.

7. In November 1955, plaintiff, at the direction of Hollander, deeded the property to one Shirley L. Schnitzer, wife of H. Lloyd Hollander. In December 1955 Perpetual received notice from Realty Title Insurance Company, Inc., Washington, D.C., that Perpetual's loan on the property had been assumed by the new owner, Shirley L. Schnitzer. In June 1956 Schnitzer deeded the property to 1823-1825 Jefferson Place, Northwest Company, a Maryland corporation, the president of which was H. Lloyd Hollander.

8. H. Lloyd Hollander began the renovation of the property and, as work progressed, withdrawals from the insurance fund account were made by plaintiff with Perpetual's permission as follows:

June 26, 1957	$2,000.00
July 19, 1957	1,500.00
September 25, 1957	1,000.00
October 28, 1957	500.00
January 8, 1958	300.00
March 13, 1958	225.00

On June 19, 1958, $4,427.26 remained in account No. 134-1553.

9. Subsequent to the sale of the property by plaintiff, the then owner of the property, the 1823-1825 Jefferson Place, N.W. Company, became delinquent in the repayment of the loan and it became necessary for the Treasurer of Perpetual to protect the interests of Perpetual. Accordingly, the trustees were instructed to and did advertise the property for sale at public auction. The firm of Thomas J. Owen and Son was employed to conduct the sale. The head of this firm is Chairman of the Board of Directors of Perpetual. At this time the property was in a state of disrepair, due to the fact that only partial repairs of fire damage had been made and the record owners had permitted damage to the property by vandalism, perpetrated by persons unknown. The property was advertised for sale to be held on January 3, 1958, with the following conditions set forth in the advertisement:

> "Terms of Sale: All cash. Deposit of $500 required at time of sale. Terms of sale to be complied with within thirty days from date of sale, otherwise the trustees reserve the right to resell the property at the risk and cost of the defaulting purchaser, after five days' advertisement of such resale in some newspaper published in the District of Columbia, or deposit may be forfeited, or without forfeiting deposit, trustees may avail themselves of any legal or equitable rights against defaulting purchaser. Further particulars at time of sale."

The advertising complied in all respects with the requirements of the deed of trust. At this time there were liens on the property totaling something over $39,000. They included a first trust to Perpetual of $13,500; a second trust by the 1823-1825 Jefferson Place Corporation to secure Garrett of $3,033.13; another trust by the 1823-1825 Jefferson Place Corporation to secure DuMond, $5,500; another trust by the 1823-1825 Jefferson Place Corporation to secure DuMond of $5,500; a Municipal Court judgment against the 1823-1825 Jefferson Place Corporation in the amount of $1,650; a Federal tax lien against the 1823-1825 Jefferson Place

Corporation in the amount of $4,045.36; two mechanics' liens against 1823-1825 Jefferson Place, N.W. Corporation, one in the amount of $1,448.23, one in the amount of $630. The total of those is something over $39,000, without interest, but at that time there was something over $11,500 owed on the first trust rather than $13,500, so that the totals would actually be reduced as of that time to something in the neighborhood of $37,000.

10. On July 31, 1957, before the date of sale, the United States, represented by the Internal Revenue Service, filed a lien against the real estate in excess of $4,000 for unpaid taxes against the 1823-1825 Jefferson Place, N.W. Company, which then owned the property as set forth in Finding 9 above.

11. The trustees' sale conducted on January 3, 1958 was in all respects in accordance with the provisions of the deed of trust and one of the conditions of sale, as announced at the sale, was that the purchaser would take the property "subject to U.S. Government tax lien, up to purchaser to satisfy tax lien." The property was sold to one Kenneth S. DuMond and wife for $12,050 and DuMond made a deposit of $500. Settlement was to be made within thirty days. After the sale, and before January 16, 1958, Perpetual granted to DuMond an extension of thirty days for settlement of this sale in order to permit DuMond to attempt to get agreement of the United States to release its tax lien of $4,053.36 plus interest against the property. On February 18, 1958, DuMond, through his attorney, advised Perpetual that the United States refused to release the lien and asserted that under the circumstances DuMond had no legal obligation to comply with the terms of the sale and demanded return of his $500 deposit. The trustees then, together with Mr. Thomas of Perpetual, discussed the question of what action should be pursued against the defaulting bidder DuMond. The trustees had three courses open to them: (1) to sell the property at the risk and cost of the defaulting purchaser, holding the deposit to cover any deficiency in the second sale over the first; (2) to sue the defaulting purchaser for a specific performance;

(3) to forfeit the deposit as liquidated damages and apply the forfeited deposit to the cost of the first sale and any balance to the note. The defaulting purchaser was in the Army and lived in Pennsylvania where he was stationed at some secret installation. The trustees concluded that to proceed under courses (1) or (2) would have entailed bringing an action against the defaulting purchaser in Pennsylvania, with possible difficulties of obtaining service on the defaulting purchaser, and with the outlay of substantial court costs and attorneys' fees. In view of these circumstances, the trustees, together with Mr. Thomas of Perpetual, decided that it would be to the best interest of all parties concerned to adopt course number three and forfeit the deposit. At this time the trustees had no reason to believe that the property would bring less at a second sale than at the first, and there was reason to believe that if they could get the United States to relinguish their tax lien on the property that it would bring more at the second sale than at the first. On February 26, 1958, Perpetual wrote to DuMond's attorney and stated that DuMond was obligated to complete the sale and if he did not the deposit would be forfeited and the property resold. On March 5, 1958, DuMond's attorney advised Perpetual by letter that his client considered his deposit of $500 forfeited in accordance with Perpetual's letter of February 26, 1958.

12. Thereafter, after consultation by the trustees and Mr. Thomas of Perpetual, a letter was written on May 9, 1958 to the District Director of Internal Revenue, in Baltimore, in which effort was made to get the Federal Government to release their tax lien in excess of $4,000 on the property. That was accompanied by appraisals of the property which were obtained by Perpetual. Effort was made up to and including part of July to get the Government to release that tax lien but the Government refused so to do.

13. On June, 1958, the fire damage to the property not having been completely repaired, and no payments having been made on the loan since August 19, 1957, Perpetual caused the balance of the insurance fund, to wit, $4,427.26, to be applied to the loan account to reduce the

unpaid balance of the loan to $7,909.04.

14. Subsequently, the property was re-advertised for public sale by the trustees. At this time the fire damage had still not been completely repaired and the premises had suffered further damage by vandals. The advertising of this second sale complied in all respects with the formal requirements of the deed of trust and was upon the same terms and conditions as the first trustees' sale. The firm of Thomas J. Owen and Son was employed to conduct the sale. On July 9, 1958, the porperty was sold to one Helen B. Brent for $9,550 free of any obligation on the part of the purchaser to satisfy the tax lien, Perpetual having assumed liability, if any, for this tax lien in order to effect the sale. On August 28, 1958 the trustees deeded the property in fee simple to Helen B. Brent.

15. The plaintiff, Leo G. Sheridan, was present at the first sale, but he was not personally present at the second foreclosure sale. Norman H. Bartow, one of his present attorneys, was present at the second foreclosure sale.

16. Subsequent to the first trial in this case the defendants paid to the plaintiff the sum of One Thousand Two Hundred Forty Two Dollars and Seventy-seven cents ($1,242,77), without interest, as ordered by Judge Keech in his judgment, that part of the judgment not having been appealed from.

And the Court, having found the foregoing facts, hereby reaches the following

Conclusions of Law

1. The trustees formed a reasoned conclusion in electing to forfeit DuMond's $500 deposit as liquidated damages and to resell the property after endeavoring to get the Federal tax lien released; and under all the conditions then existing they acted as ordinarily prudent trustees would have acted in the circumstances then existing and trustees who were cognizant of their duties to all the persons to whom they owed a fiduciary relationship in this matter.

2. The Treasurer of Perpetual acted properly and in accordance with the contract between plaintiff and Perpetual in applying the balance

of the insurance fund to reduce the unpaid balance of the loan.

3. The trustees acted in good faith toward all parties and their actions were in accordance with the requirements of their trust.

4. The foreclosure sale of July 9, 1958 was valid.

5. There is no showing that the Treasurer of Perpetual acted in any manner other than in good faith in this matter.

6. That the action herein should be dismissed and in view of the fact that the plaintiff prevailed to the extent of $1,242.77 in the first case, and the defendant has prevailed in this case, the Court will provide, as did Judge Keech, that each party pay their respective costs.

And the Court, having made the foregoing Findings of Fact and Conclusions of Law hereby renders the following

Final Judgment

IT IS ADJUDGED, ORDERED AND DECREED:

1. That in all respects except as provided in Paragraph 1 of the judgment entered herein the 16th day of November, 1960, the Complaint shall be, and it is hereby, dismissed.

2. That each of the parties shall bear his own costs.

Dated: November 16, 1962

/s/ George R. Hart, Jr.
Judge

[Ceritficate of Service]

[Filed November 19, 1962]

MEMORANDUM OF PLAINTIFF'S SUGGESTIONS ON FINDINGS OF THE COURT

The attached proposed findings of fact and conclusions of law prepared by counsel for plaintiff conform in all respects to the findings announced in open court October 9, 1962 as reported at pages 2-12 in the transcript thereof. No change has been made in findings 1, 3, 5, 7, and 14, nor in the conclusions of law. No deletions have been made except in finding 9 where the exact date and amount of the tax lien was inserted in place of a general reference to time and amount.

Additions, but no deletions other than purely formal ones, have been made to findings numbered 2, 4, 6, 8, 10-13. For the convenience of the court, photocopies of those findings with brackets around the new part are attached hereto. Reference to the transcript or exhibit supporting such additional material is shown by references in the margin.

In comparing these proposals with those submitted by defendants, it should be observed that defendants' proposals include part of the court's preliminary remarks with some further explanation as finding number 1, thereby placing defendants' findings somewhat out of step with those appearing in the transcript of the court's remarks and followed in plaintiff's proposals.

Plaintiff has no further comment on defendants' proposals, except with respect to defendants' proposed findings 3 and 15. The subject of either Mr. Sheridan or Mr. Bartow being required to testify in this case was first raised by defendants' subpoena to Mr. Sheridan. This was discussed in chambers in the presence of the court at the very outset of the trial. Mr. Dowdey was concerned about the physical and nervous strain on Mr. Sheridan, a man of advanced years and poor health, and the possibility of Mr. Bartow being placed in the uncomfortable position of counsel and witness at trial.

With respect to Mr. Sheridan, Mr. Dowdey further explained his meager knowledge of the matter and inability to furnish any papers defendants did not already have. Although no facts were agreed upon, Mr. Sheridan was excused from attendance at court, subject to being recalled at the request of defendants' counsel on half hour's notice. The offer of a medical certificate was refused at the time. So that there can be no possible doubt about it, a medical certificate obtained the day after trial is attached hereto. Also attached is an earlier medical certificate, the substance of which was communicated to Mr. David Scrivener prior to the first trial.

No objection is voiced to showing, as in plaintiff's suggested finding 2(a) that it is not known whether Mr. Sheridan actually knew of the connection between Scrivener and Perpetual, but it is unwarranted to call specific attention to Mr. Sheridan's failure to testify in the light of the circumstances.

Likewise, it is unfair to comment on Mr. Bartow's failure to testify. The record of this case will show that it was originally filed by Landon G. Dowdey and S. Churchill Elmore as counsel to Mr. Sheridan. The only appearance Mr. Bartow ever entered was the noting of an appeal after the first trial. This was by reason of the formation of a partnership about that time with Mr. Dowdey. In chambers, in the presence of the court, Mr. Bartow stated that the loan by his client, Bartow Realty Inc., referred to in the subpoena to Sheridan had long since been paid and that Bartow Realty Inc. had never had any interest in this litigation. Defendants' counsel apparently being satisfied on this point, Mr. Bartow sat in and assisted as co-counsel at the trial. Nevertheless, his name was constantly and needlessly interjected at every opportunity at trial. The attempt now to interject it in a finding is adding insult to injury. What transpired at the foreclosure sales has not been disputed. Mr. Bartow never represented Mr. Sheridan until long after this suit was filed. So far as relevance is concerned, it might be just as well to list everybody known to have attended either

of the foreclosure sales and recite that they didn't testify either. Mr. Bartow as a member of the Bar of this court and as counsel in this case is entitled to the protection of this court from such unfounded attempts to involve him personally in litigation in which he appears as counsel.

In submitting these suggestions plaintiff does not concede the correctness of the court's findings of fact or conclusions of law except as to previously stipulated findings 1 through 12 from the first trial and the specific additions now proposed by him. It is plaintiff's position that the evidence in this case requires as a matter of law the entry of judgment for the plaintiff in the amount of $3,184.49 with interest thereon through October 1962, bringing the balance due plaintiff to $4,208.56: that the same judgment is required by any and all current proposals for findings; and that findings not stipulated or proposed by plaintiff are unsupported by substantial evidence, clearly erroneous, and insufficient to support a judgment for defendant.

* * * * *

[REQUESTED FINDINGS]

2. Defendant Samuel Scrivener, Jr. and Junior F. Crowell were named as trustees in the deed of trust. Samuel Scrivener, Jr. is an officer and director of Perpetual. Junior F. Crowell manages Fidelity Investment Company, a partnership composed of all the directors of Perpetual. Among other things, Fidelity Investment Company earns commissions as insurance agent on policies required under deeds of trust securing loans made by Perpetual where the borrower fails to designate his own agent.

(a) The connection of Samuel Scrivener, Jr. with Perpetual appears in publications available at Perpetual offices and in annual statements published in local newspapers. Beyond this, no effort was made to advise plaintiff of Scrivener's connection with Perpetual. It is not known whether he actually knew of such connection.

(b) Except for disclosure in court proceedings on the witness stand, the fact that Fidelity Investment Company is owned by Perpetual directors has never been made public, nor otherwise communicated to plaintiff.

4. A policy of fire insurance satisfying the trust provisions was written through Fidelity Investment Company. It named Leo G. Sheridan as the assured. It also contained provisions dealing with the interest of Perpetual, but the terms thereof were not shown. In February 1955 the improvements on said realty were partially destroyed by fire and on April 26, 1955 a check for $9,713.41 for the fire damage was issued by the Firemens Insurance Company, payable jointly to plaintiff and Perpetual, which check was deposited in Account No. 134-1553 in Perpetual on April 5, 1957 (two years later) in the names of "Leo G. Sheridan and Perpetual Building Association, as their interest may appear." The President of Perpetual is an officer and director of Firemens Insurance Company. The extent of his stock interest and the interest of any other officer or director of Perpetual is unknown.

6. In November 1955, plaintiff, at the direction of Hollander, deeded the property to one Shirley L. Schnitzer, wife of H. Lloyd Hollander. In December 1955 Perpetual received notice from Realty Title Insurance Company, Inc., Washington, D.C., that Perpetual's loan on the property had been assumed by the new owner, Shirley L. Schnitzer. Perpetual made due note of the assumption by Schnitzer on its records, Sheridan's mailing address being deleted and Schnitzer's substituted in its place. In June 1956; Schnitzer deeded the property to 1823-1825 Jefferson Place, Northwest Company, a Maryland corporation the president of which was H. Lloyd Hollander. No assumption was involved in the transfer by Schnitzer to the corporation.

8. * * * * *

At this time the property was in a state of disrepair, due to the fact that only partial repairs of fire damage had been made and the record owners had permitted damage to the property by vandalism, perpetrated by persons unknown. No note payments had been made since August 19, 1957 and it had been reported to Perpetual that renovation of the property had been at a standstill since prior to April 1957. Foreclosure had been recommended July 29, 1957 "to prevent further vandalism." The property was advertised for sale to be held on January 3, 1958,

* * * * *

The total of these is something over $39,000, without interest but at that time there was something over $11,500 owed on the first trust rather than $13,500, so that the totals would actually be reduced as of that time to something in the neighborhood of $37,000. Four notices of foreclosure on forms bearing the name of Thomas J. Owen and Son, similar to that calling for sale on January 3, 1958, had previously been sent out by Perpetual, the first in April of 1957. In each instance copies were mailed to Sheridan, Schnitzer, Garrett and DuMond. None of these notices was actually advertised in the newspapers, however, except the one calling for sale on January 3, 1958. The other sales were postponed by Perpetual's Treasurer or President or both. In one or two instances it was because a note payment was received. In another it was at the request of the attorney for DuMond, to give him time to decide on a course of action. Except for mailing formal notices of foreclosure,plaintiff was neither consulted nor advised by Perpetual or the trustees with respect to any of the foregoing matters.

10.

* * * * *

On March 5, 1958, DuMond's attorney advised Perpetual by letter that his client considered his deposit of $500 forfeited in accordance with Perpetual's letter of February 26, 1958. Plaintiff was present at the sale January 3, 1958, but apart from his observations of what occurred

there he was neither consulted nor advised by Perpetual or the trustees with respect to any of the foregoing matters. He was not advised or consulted because he was considered by them to be "out of it" that is: no matter how much the property sold for, it would not have benefited him, and even if it had sold for as little as $10 it would not have harmed him because it was not their practice or policy to sue for a deficiency.

11. Thereafter, after consultation by the trustees and Mr. Thomas of Perpetual, a letter was written on May 9, 1958 to the District Director of Internal Revenue, in Baltimore, in which effort was made to get the Federal Government to release their tax lien in excess of $4,000 on the property. This was accompanied by appraisals of the property which were obtained by Perpetual. Effort was made up to and including part of July to get the Government to release that tax lien but the Government refused so to do. Plaintiff was neither consulted nor advised by Perpetual or the trustees with respect to any of this.

12. On June 19, 1958, the fire damage to the property not having been completely repaired, and no payments having been made on the loan since August 19, 1957, Perpetual caused the balance of the insurance fund, to wit, $4,427.26, to be applied to the loan account to reduce the unpaid balance of the loan to $7,909.04. The same day the executive committee of Perpetual, of which Samuel Scrivener, Jr., is vice chairman, also authorized a second foreclosure sale, and determined that such sale would be made free of any obligation on the part of the purchaser to satisfy the tax lien, Perpetual being willing to assume such liability if there were any. No notice of the willingness of Perpetual to assume the risk of an unsatisfied tax lien was given to DuMond or his attorney, although formal notice of the sale was sent to them. Plaintiff was neither consulted nor advised by Perpetual or the trustees with respect to any of the foregoing matters, although formal notice of the second sale was mailed to him.

13. Subsequently, the property was re-advertised for public sale by the trustees. At this time the fire damage had still not been completely repaired and the premises had suffered further damage by vandals. * * *

* * * * *

On August 28, 1958 the trustees deeded the property in fee simple to Helen B. Brent. As was the case at the first foreclosure sale on January 8, 1958, and the usual practice at all foreclosures by Perpetual, the Treasurer made an initial bid sufficient in amount to cover the balance due on Perpetual's loan and the costs and expenses of the sale. Also, as in the first sale, there was a general reluctance to bid, the purchaser being the only other bidder paying just $50 over Perpetual's initial bid. Sheridan did not attend this sale, nor did Perpetual or the trustees consult or advise with him respecting it beyond the mailing of a formal notice.

MEDICAL CERTIFICATES

October 12, 1962

TO WHOM IT MAY CONCERN:

Mr. Leo Sheridan of 5511 Broad Branch Road, N.W., is under my professional care. He has recently had a general checkup and remains under a lot of tension.

Because of his physical condition, I do not recommend Mr. Sheridan taking an active part in any court litigation.

SIGNED: Robert W. Sjogren, M.D.

February 16, 1960

To Whom It May Concern:

Mr. Leo Sheridan of 5511 Broad Branch Road, N.W. is under my professional care. He is under considerable tension concerning an impending civil court suit. He has a number of debts and financial obligations which contribute to his emotional stress. I feel that an early settlement of the suit would be helpful in his overall medical case.

SIGNED: Robert W. Sjogren, M.D.

[Filed November 19, 1962]

MEMORANDUM OF DEFENDANTS' OBJECTION TO PLAINTIFF'S PROPOSED FINDINGS OF FACT AND DEFENDANTS' OBJECTION TO THE COURT'S RECEIPT OF CERTAIN PURPORTED FACTUAL MATERIAL NOW PRESENTED FOR THE FIRST TIME BY PLAINTIFF

A

Defendants objection to plaintiff's proposed findings of fact

1. Subsequent to the hearing in the above entitled action, the defendants, at the court's request, prepared findings of fact, conclusions of law and judgment which were filed with this Honorable Court on the 22nd day of October, 1962. The findings of fact as prepared by defendants followed almost verbatim the findings delivered orally from the bench on October 9, 1962.

2. On the 7th day of November, 1962, plaintiff filed with this Honorable Court proposed findings of fact which attempt to add substantial amount of "factual" detail to the findings as rendered orally by the court and as prepared in written form by defendants.

3. Defendants respectfully submit that many of the additional findings of fact which the plaintiff asks this court to make are without support in the record. Moreover, all of the additions are irrelevant and serve only to add needless detail. Findings of fact should not be a recitation of all the evidence brought forth at the trial and the inferences drawn therefrom, but rather a condensed summary of the relevant facts upon which the court's conclusions of law are based.

4. A typical example of plaintiff's proposed additions in findings of fact is the following passage which he has inserted in paragraph 3 of defendants' proposed findings:

> "(b) Except for disclosures in court proceedings on the witness stand, the fact that Fidelity Investment Company is owned by Perpetual directors has never been made public, nor otherwise communicated by plaintiff."

The alleged source of this addition is the testimony of Mr. Thomas, pages 84-89 in the testimony of Mr. Samuel Scrivener, pages 3-5 and 18-19. An examination of this testimony shows that neither of these witnesses even discussed the question of whether or not the ownership of Fidelity Investment Company had been made public. Thus, in order to determine whether or not this proposed finding has any basis in the record, the court and the defendants must peruse the entire record. Plaintiffs evidently rely upon the testimony of Mr. Junior Crowell which was alluded to by counsel for plaintiff in a colloquy with the court following the court's delivery from the bench of the findings of fact and conclusions of law. (See page 14 of the transcript for October 9, 1962). Even assuming that this testimony may support the contention that the ownership of Fidelity Investment Company was not communicated to the plaintiff, it clearly does not support the assertion that this ownership had "never been made public." (emphasis added) This "fact" asserted by the plaintiff is an obvious attempt to imply that secret and improper relations existed between Perpetual and Fidelity Investiment Company. Plaintiffs make no attempt to show the relevance of this "fact" to the case.

5. In this memorandum, it is impractical to examine each one of the plaintiff's proposed additional findings of fact in detail. At this time counsel for defendants wish simply to report their objection to all of the said additions on the ground above-stated; and, if the court is disposed to grant any of them, to request an oral hearing.

B

Objection to the court's receipt of certain purported factual material now presented for the first time by plaintiff

1. On pages 2 through 4 of the memorandum which accompanies plaintiff's additional findings of fact, counsel for plaintiff comments on paragraphs 3 and 15 of defendants' proposed findings of fact. Paragraph 3 is a finding that the plaintiff, Leo G. Sheridan, did not testify at the trial and paragraph 15 is a finding that Norman H. Bartow was present at the second foreclosure sale and did not testify at the trial.

2. Counsel for the plaintiff, at this stage, is attempting to provide himself with the means of arguing on appeal that his strategic decision not to call Sheridan or Bartow to the witness stand was the result of ill health in Sheridan's case, and, in Bartow's case, some vague "satisfaction" on the part of defendants' counsel. With respect to Sheridan, the plaintiff was personally in the courtroom at the beginning of the trial and was allowed by his counsel to absent himself from the courtroom during the trial. Although defendants had subpoenaed Sheridan, it was made plain to plaintiff's counsel that his absence from the witness stand would be noted and argued. We do not agree that there is any showing that Sheridan's health justified his absence from the witness stand. During the trial, as a result of conferences in chambers it was necessary for plaintiff's counsel to communicate with Sheridan and it was found that he was not at home. The two "medical certificates" are certainly wholly inadequate. The first is dated two and half years before the trial and the other is dated three days after the trial was over. In the more recent certificate his doctor does not state that he was physically unable to testify nor that he was in any danger if he should testify but merely that he did not recommend Sheridan's "taking an active part in any court litigation." The defendants' proposed finding No. 3 was taken verbatim from the findings made orally by the court (page 15 of the transcript, October 9, 1962).

The references by plaintiff's counsel to Bartow's failure to testify are more seriously improper. First, counsel for the defendants have never been "satisfied" concerning statements made by Mr. Bartow in chambers. If Mr. Bartow told the court in chambers facts pertinent to the trial, but which were informal and not used by the court, it is manifestly improper for plaintiff's counsel to attempt to repeat Bartow's statement in a memorandum designed to implement an otherwise inadequate record. The fact is, of course, that Mr. Bartow is, and for a long time has been, acting as counsel for Sheridan; but at the time of the foreclosures of the property involved in this case Mr. Bartow had

a personal interest and was apparently present, and is a "witness" in any sense of the word. If he and Mr. Dowdey chose not to permit him to testify they certainly should not be permitted now to pad the record with statements made in chambers, not under oath, and not subject to cross-examination. Assuming that no statement made by Mr. Bartow in chambers was false, and we do not assert that it was, it is entirely possible that, if he had testified and had been cross-examined, additional facts would have been developed. Plaintiff's counsel has again entirely missed the point: The defendants have come forward and forthrightly testified in full, but the plaintiff himself and one of his counsel have failed so to do. They wish all the advantages of silence but they are not willing the accept the burden.

For the foregoing reasons defendants, by their counsel, respectfully request that the court promptly sign the findings of fact already submitted and made orally by the court.

* * *

[Filed December 14, 1962]

NOTICE OF APPEAL

Notice is hereby given that Leo G. Sheridan, plaintiff in the above-entitled action, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the final judgment entered herein November 16, 1962.

Dated 12-14-62

* * *

[Filed January 17, 1963]

ORDER DENYING DEFENDANTS' MOTION TO STRIKE THE NOTICE OF APPEAL, ETC.

Upon consideration of Defendants' Motion to Strike the Notice of Appeal or to Require Plaintiff to File Cost Bond and plaintiff's opposition thereto, it appearing to the court that the customary cost bond was filed with the Notice of Appeal on December 14, 1962 and the amount thereof is adequate, it is by the court this 16th day of January, 1963,

ORDERED

That Defendants' Motion to Strike the Notice of Appeal or to Require Plaintiff to File Cost Bond be and the same hereby is denied.

/s/ G.L. H. J.
Judge

[Filed January 22, 1963]

DEFENDANT'S EXHIBIT 16a

ASSIGNMENT

THIS INDENTURE, made this 26th day of June, 1957, by and between Leo G. Sheridan of 1900 R Street, N. W., Washington, D. C., party of the first part, hereinafter called the debtor, and Bartow Realty Co., Inc., party of the second part, hereinafter called the assignee,

WITNESSETH:

That, whereas, the debtor is justly indebted to Bartow Realty Co., Inc. in the sum of $3300.00 with interest at the rate of six per cent per annum, and

Whereas, the debtor has executed and delivered with these presents his one promissory note, payable to Bartow Realty Co., Inc., in the sum of $3300.00, plus interest, and

Whereas, the debtor is justly entitled to the proceeds of a check in the sum of $9,713.41, dated April 26, 1955, payable to Perpetual Building Association and Leo G. Sheridan, for a loss by fire of premises 1743 - 18th Street, N. W., Washington, D. C., and drawn by Firemen's Insurance Company, and

Whereas, the debtor desires to secure repayment of the said promissory note which is payable to Bartow Realty Co., Inc. as aforesaid,

Now, therefore, this indenture witnesseth that the party of the first part in consideration of the premises and other valuable consideration by the party of the second part, has granted, assigned, transferred and set over and by these presents does grant, assign, and transfer and set over to the party of the second part all his right, title and interest in and to the proceeds of said check, payable as aforesaid, by the Firemen's Insurance Company to Leo G. Sheridan and Perpetual Building Association, less an assignment to Samuel J. Gorelitz in the original sum of $3250.00 plus interest.

It is further agreed by and between said parties herein that out of the proceeds of said check payable as aforesaid the said Bartow Realty Co., Inc. shall be paid the sum of $3300.00, plus accrued interest from ~~date hereof,~~ Feb. 28, 1956 and the balance shall be paid to the said Leo G. Sheridan. L. G. S.

It is further covenanted and agreed by and between the parties hereto, that in the event the said sum which shall be due and payable to Bartow Realty Co., Inc., as aforesaid, shall not be paid within 2 months from date hereof, than Bartow Realty Co., Inc. shall be entitled to an additional sum not to exceed 6% of the total sum due to them, plus accrued interest due and payable, as aforesaid, for placing of the loan for Leo G. Sheridan, party of the first part, as hereinabove set forth.

And the party of the first part further covenants and agrees with the party of the second part, that in the event the proceeds of said check payable to Leo G. Sheridan and Perpetual Building Association, as aforesaid, are not paid over in 2 months that the party of the first part will execute and deliver a deed of trust securing repayment of said promissory note payable to Bartow Realty Co., Inc., said deed of trust to be secured on property described as Lot 65, Square 111, being premises 1900 R Street, N. W. and Lot 22 in Square 2014 known as 5511 Broad Branch Road, N. W., Washington, D. C. Said deed of trust to be further security for repayment of said promissory note.

IN WITNESS WHEREOF, the parties of the first and second part have hereunto set their hands and seals on the date hereinbefore set forth.

this assignment is to be consolidated with assignments dated Jan. 12, 1956 an Feb. 29, 1956 - L. G. S.

/s/ Leo G. Sheridan (Seal)

Bartow Realty Co., Inc.

By /s/ Norman H. Bartow (Seal)

Subscribed and sworn to before me this 26 day of June, 1957.

/s/ Elizabeth M. Kent
Notary Public, D. C.

DEFENDANT'S EXHIBIT 16 b

[Filed Jan. 22, 1963]

BARTOW REALTY CO.

INCORPORATED

REALTORS

MEtropolitan 8 (2495
(2496

1331 G Street, Northwest
Second National Bank Building
Washington 5, D. C.

June 26, 1957

Perpetual Building Association
12th & E Streets, N. W.
Washington, D. C.

Re: Leo G. Sheridan
Fire Damage at
1743 - 18th - Street, N. W.

Attn: Mr. Dooley

Gentlemen:

Inclosed herewith is an assignment executed by Mr. Leo G. Sheridan against the proceeds of a certain check payable to Perpetual Building Association and Leo G. Sheridan and drawn by Firemen's Insurance Company. Said assignment is in favor of our company.

Yours very truly,

BARTOW REALTY CO., INC.

by /s/ Norman H. Bartow

Incl:
Assignment